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RECORD, CASE No. 14,251.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 239.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

GERHARD SCHUMACHER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED OCTOBER 13, 1890.

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1 In the District Court of the United States for the Western District of Arkansas, Aug. Term, A. D. 1887.

GERHARD SCHUMAKER, Plaintiff,
vs.
THE SAINT LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Defendant.
} Complaint at Law.

The plaintiff herein, Gerhard Schumaker, a subject of the Empire of Germany and, at the time of the injury hereinafter complained of, residing in the Choctaw nation, in the Indian country, in the western district of Arkansas aforesaid, as an employee of the defendant, complains of the Saint Louis and San Francisco Railway Company, a corporation duly organized under the laws of Missouri, a citizen of the said State of Missouri, but doing business in the said Choctaw nation, in the said western district of Arkansas, being engaged under the permission and authority of an act of Congress of the United States in operating a line of railway extending from Paris, in the State of Texas, through the Choctaw nation, in said western district of Arkansas, to a point on the Arkansas State line near Fort Smith, in said State of Arkansas, which said line there connects with a line of railway running through the State of Arkansas to the Missouri State line and there connected with a line
2 of railway operated by the said defendant and which extends to Saint Louis, in the State of Missouri, and for his cause of action states—

That on the third day of July, 1887, at the Choctaw nation, in the Indian Territory, in said district, the said plaintiff was employed by the said defendant as a laborer on a gravel train on said railway and said plaintiff boarded the train at Tuscahoma, in said nation, in discharge of his duty, to aid in unloading said gravel when the car should reach its destination, and that when said train reached the station of Talihina, on said railway, it was stopped on the main track and several cars loaded with gravel were then on the side track, and also an engine and caboose attached to it, and after said cars were switched to the main track from the side track they were cut loose from the engine by the servants of said defendant and allowed to run with great force and violence down grade till they struck the train on which said plaintiff was riding, and that the brakeman on said train so striking as aforesaid was unable to diminish the speed or check or control said cars so running, as last aforesaid, by reason of a defective brake with which said car was supplied by the said defendant; that the said defendant had
3 notice or might, by proper diligence and care, have had notice of the defective condition of said brake, and that it was the duty of said defendant to provide proper and suitable brakes for said cars, and by the negligence and want — care of and by the said defendant in permitting and causing the said defective brake to be used on said cars, and by failing to provide said cars with proper and sufficient machinery and appliances for

checking the speed of said cars, the said plaintiff was, by the striking of said cars so running as aforesaid against the train on which the plaintiff was riding as aforesaid, violently and with great force thrown from the said car to and upon the track of said railway, and that the wheels of the said car then and there ran over the left foot of the said plaintiff, crushing the same and inflicting divers serious and painful injuries on the body of said plaintiff, and that the said plaintiff was then and there further injured by the toes of his right foot being crushed and his right knee and right elbow being severely bruised and injured, and that from the wounds and injuries so received as aforesaid by the said plaintiff and so inflicted by the negligence of the defendant as aforesaid it became and was necessary for the said plaintiff to submit to the amputation of his
4 said left leg above the knee. Said plaintiff says that from the third day of July, 1887, when he received the injuries aforesaid, until the present date, his condition has been most dangerous and painful and his physical and mental suffering intense; that he was dependant for his support upon his own personal labor, and that all his time since said injuries has been wholly lost from labor, and that his injuries and incapacity to *to* labor will be permanent; that on account of said injuries he has been at great expense procuring medical attendance, medicine, nursing, board, and attention, and that — reason of the wrongs and negligence of the defendant as aforesaid said plaintiff has been damaged in the sum of fifteen thousand dollars. Wherefore he brings suit and prays judgment against said defendant in the sum of $15,000.00 and all his costs in this cause laid out and expended.

GERHARD SCHUMAKER,
By MARCUM & GRACE, *Att'ys.*

Gerhard Schumaker, the plaintiff, being duly sworn, says the above statements are true.

GERHARD SCHUMAKER.

Subscribed and sworn to before me this 21st day of February, 1888.

A. O. RULE,
Notary Public, City of Saint Louis, State of Missouri.

Filed Sept. 23rd, 1887.

5 *Supplemental Complaint Amendment.*

And the said plaintiff, George Schumaker, for a further cause of action states that he is a subject of the Empire of — and at the time of the injury hereinafter complained of residing in the Choctaw nation, in the Indian country, in the western district of Arkansas aforesaid, and an employee of defendant, and complains of the Saint Louis and San Francisco Railway Company, a corporation duly organized and created under the laws of the State of Missouri, but doing business in said district under authority of an act of Congress in operating a line of railway in the Choctaw nation, in said district,

and for his cause of action states that on the 3rd day of July, 1887, at said Choctaw nation, in said district, the said plaintiff was employed by the said defendant as a laborer on a gravel train on said railway, and that said plaintiff boarded the train, in pursuance of his duty, at Tuscahoma and proceeded to Talihina, where the defendant, through its agents, so negligently and improperly managed the said train and the cars of said defendant that the said plaintiff was knocked off of said train and run over by the cars of said defendant and greatly injured thereby.

6 Said plaintiff says it was the duty of the defendants to make and enforce suitable regulations as to the manner of switching and making up trains and regulating the speed thereof and providing sufficient number of brakemen to check and control said cars while switching and at all other times, and so to manage its trains as not to endanger the life or limbs or safety of its servants, but this plaintiff says that the defendant violated its duty to him in said particular and the same wholly neglected and failed to perform, and that by said negligence of the said defendant the said plaintiff was run over and injured greatly as aforesaid, to the damage of said plaintiff fifteen thousand dollars.

Wherefore he prays judgment for said sum and all costs herein expended.

G. SCHUMAKER,
By MARCUM & GRACE, *Att'ys.*

Filed May 28, '89.

7 UNITED STATES OF AMERICA, }
Western District of Arkansas. }

In the District Court of the United States of America for the Western District of Arkansas.

GEO. SHUMAKER, Plaintiff, }
vs.
ST. L. & S. F. R'Y Co., Defendant. }

Now comes The St. L. & S. F. Railway Company, defendant herein, and demurs to plaintiff's complaint—

Because this court has no jurisdiction of the subject of the action or of the person of plaintiff or def't.

CLAYTON, BREZZOLARA & FORRESTER,
Att'ys for Def't.

Filed Jan. 23rd, 1888.

TUESDAY, *Feb'y* 14, 1888.

On this day comes the parties, by their respective attorneys, and the demurrer of defendant to complaint of plaintiff heretofore filed coming on to be heard, and the court, upon being well and sufficiently advised in the premises, doth overrule said demurrer.

8 UNITED STATES OF AMERICA,
Western District of Arkansas.

In the Circuit Court of the United States of America for the Western District of Arkansas.

GERHARD SCHUMAKER, Plaintiff,
vs.
SAINT LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Defendants.

Comes The St. Louis and San Francisco Railway Company, the defendant herein, and for answer to plaintiff's complaint says:

Defendant denies that the plaintiff at the time of the injury complained of in his complaint was residing in the Choctaw nation, in the Indian country, in the western district of Arkansas, as an employee of this defendant.

Defendant denies that on the 3rd day of July, 1887, at the Choctaw nation, in the Indian Territory, in said district, that plaintiff was employed by this defendant as a laborer on a gravel train on said railway; that said plaintiff boarded the train at Tuscahoma, in said Choctaw nation, in discharge of his duty to and in unloading said gravel when the car should reach its destination; denies that when said train reached the station of Talihina on said railway it was stopped on the main track and several cars loaded
9 with gravel were then on the side track, and also an engine and caboose attached to it, and that after said cars were switched to the main track from the side track that they were cut loose from the engine by the servants of said defendant and allowed to run with great force and violence down grade till they struck the train upon which plaintiff was riding, and denies that the brakeman on said train so striking as aforesaid was unable to diminish the speed or check or control said cars so running as last aforesaid, and denies that by reason of a defective brake, with which said cars were supplied by this defendant, that the said defendant had notice or might by proper diligence and care have had notice of the defective condition of said brake; that defendant had provided proper and suitable brakes for said cars, and denies that by negligence and want of care of and by the defendant in permitting and causing the said defective brake to be used on said cars, and that by failing to provide said cars with *and* sufficient machinery and appliances for checking the speed of said cars the said plaintiff was by the striking of said cars so running as aforesaid
10 against the train on which the said plaintiff was riding as aforesaid violently and with great force thrown from said cars to and upon the track of said railway, and that the wheels of the said car then and there ran over the left foot of the said plaintiff, crushing the same and inflicting divers serious and painful injuries on the body of plaintiff, and denies that plaintiff was then and there further injured by the loss of his right foot being crushed and his right knee and right elbow being severely bruised and injured, and denies that from the wounds and injuries so received as aforesaid by the plaintiff and so inflicted by the negligence of de-

fendant it became necessary for plaintiff to submit to the amputation of his left leg above the knee.

Defendant denies that by the negligence and carelessness of this defendant that plaintiff from the said 3rd day of July, 1887, when he received the injuries alleged in his complaint, until the present date, his condition has been most dangerous and painfull and his physical and mental suffering intense; denies that plaintiff was dependant for his support upon his own personal labor, and that all his time since said injuries has been wholly lost from
11 labor; denies that on account of said injuries he has been at great expense in procuring medical attendance, medicine, nursing, board, and attention; defendant denies that by reason of wrongs and negligence of this defendant said plaintiff has been damaged in the sum of $15,000.00 or in any other sum or amount whatsoever, and denies that plaintiff is entitled to judgment against this defendant in the sum of $15,000.00 or in any other sum or amount whatsoever.

This defendant alleges that if the plaintiff was injured at all it was by his, the said plaintiff'-, own carelessness and contributory negligence.

And defendant, for answer to plaintiff's supplemental complaint filed May the 28th, 1889, says that it denies that plaintiff was at the time of the alleged injury complained of residing in the Choctaw nation, in the Indian country, in the western district of Arkansas aforesaid, as an employee of this defendant.

Defendant denies that on the 3rd day of July, 1887, at the Choctaw nation, in the said district, the plaintiff was employed by this defendant as a laborer on a gravel train on its railway, and denies that plaintiff boarded the gravel train in pursuance of his duty at Tuscahoma and proceeded to Talihina, where this defend-
12 ant denies, through its agents, it did so negligently and improperly manage the said train and the cars of this defendant that plaintiff was knocked off of said train and run over by the cars of this defendant and greatly injured thereby; that defendant did make, publish, and enforce suitable *suitable* regulations as to the manner of switching and making up trains and regulating the speed thereof, and had and provided a sufficient number of brakemen to check and control said cars while switching and at all other times, and did have and provide a sufficient number of brakemen so to manage its trains as not to endanger the life or limb or safety of its servants, and did so manage its trains as not to endanger the life or limb or safety of its servants. Defendant denies that it violated its duty to plaintiff in the said particulars, and that it wholly neglected and failed to perform its duty aforesaid, and denies that by the negligence of this defendant the plaintiff was run over and injured greatly as aforesaid, to the damage of said plaintiff $15,000.00, or to his damage in any sum or amount whatsoever.

This defendant alleges and says that if the plaintiff was injured in the manner alleged and herein set forth that it was the fault

of said plaintiff and was occasioned by his own carelessness
13 and *and* contributory negligence.

CLAYTON, BRIZZOLARA & FORRESTER,
Attorneys for Defendant.

Filed May 28, 1889.

14 United States District Court, Western District of Arkansas.

GEORGE SHOEMAKER
vs.
ST. LOUIS & SAN FRANCISCO R. R. Co.

I certify that the writ of summons issued in this cause, dated Sept. 23rd, 1887, was duly served on the 7th day of October, 1887, at Choteau Station, in the Choctaw nation, I. T., on said railroad in the western district of Arkansas, by delivering into the hands of Martin Healy, an agent of said company, a true copy of the same, and I further certify that the original summons has been lost, and after diligent search cannot be found.

JOHN CARROLL,
U. S. Marshall,
his
By JAMES x HAMPTON, *Deputy.*
m'k.

Witness:
J. C. PETTIGREW.

Filed Dec. 5th, 1887.

15 United States District Court, Western District of Arkansas.

Writ of Summons.

St. Louis & San Francisco R. R.

I hereby certify that the writ of summons issued in the above-entitled cause, dated September 23, 1887, was duly served on the 30th day of September, 1887, by delivery of a true copy into the hands of D. M. Nichols, an agent of said railroad, at Hacket City, a station on said railroad within the western district of Arkansas, and I further certify that the original summons herein is lost, and after diligent search cannot be found.

JOHN CARROLL,
U. S. Marshall,
By B. T. HUGHES, *Deputy.*

Filed Dec. 5th, '87.

16 UNITED STATES OF AMERICA, } *ss:*
Western District of Arkansas, }

The President of the United States of America to the marshal of the western district of Arkansas:

You are commanded to summon the St. Louis and San Francisco Railway Company to answer, on the first day of the next November

term of the district court of the United States for the western district of Arkansas, a complaint filed against them in said court by George Schumacher and warn them that upon their failure to answer the complaint will be taken for confessed, and you will make due return of the summons on the first day of the next November term of said court.

Witness my hand and the seal of said court, at Fort Smith, in said district, this 23 day of Sept., 1887.

STEPHEN WHEELER, *Clerk*,
By ED. HAGLIN, *D. C.*

16½ [Endorsed:] No. 343. George Schumacher *vs.* St. Louis and San Francisco Railway Company. Complaint at law. Summons issued Sept. 23, 1887, returnable Nov. term, 1887. Returned and filed ——, 1887. —— ——, clerk. James Hampton is authorized to serve the within summons. John Carroll, U. S. marshal.

Marshal's Fees.

1 service	2 00
Mileage	1 00
P'd by plaintiff	$3 00

I served the within summons on the St. Louis and San Francisco railroad by then and there giving a true copy to M. J. Heady, an agent of said railroad, at Poteau station, in the Choctaw nation, on the 7th day of October, 1887.

JOHN CARROLL,
U. S. Marshal,
his
By JAMES x HAMPTON,
mark.
Dep'ty U. S. M.

17 In the Circuit Court of the U. S. for the Western District of Arkansas, May Term, 1889.

TUESDAY MORNING, 9 O'CLOCK, *May* 28, *A. D.* 1889.

Court met pursuant to adjournment.

Present: The Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

GERHARDT SHOEMAKER *vs.* ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY.	Comp. at Law. #343.

On this day come the plaintiff, Gerhardt Shoemaker, and by his attorney, Geo. A. Grace, Esq., and come the defendant-, by their attorneys, Mess. Clayton, Brizzolara and Forester, and, both parties having announced themselves as ready for trial, it is ordered by the court that the clerk draw eighteen names from the jury-box and

issue a *venire facias* for the persons so drawn, returnable forthwith, which was accordingly done; and now comes the marshal and returns into court the *venire facias* issued as aforesaid, duly served, and the persons thereon named, *and* being called, answered to their names, and after challenge by both plaintiff and defendant the following were selected for the trial of this cause, to wit, Ed. D. Brogan, Henry St. Clair, Hiram Chism, Robert Trotter, S. M. Fisher,
Robert Harris, Albert Tinker, N. M. Mitchell, Louis Miller,
18 Wm. Joshenberger, Henry C. Haney, Edward Hunt, twelve good and lawful men of the western district of Arkansas duly selected, empannelled, & sworn to try the issue joined between the said plaintiff and defendant and a true verdict render according to the law and the evidence, and, there not being time to further progress in the trial of this cause, they were permitted to seperate, under the instructions of the court, until to-morrow morning, 8½ o'clock.

WEDNESDAY, *May* 29.

(Opening order omitted.)

On this day come- the plaintiff and by his attorney, Geo. A. Grace, Esq., and come the defendant-, by their attorneys, Mess. Clayton, Brizzolara and Forrester, and now come the jury heretofore selected for the trial of this cause, to wit, Ed. D. Brogan, Henry St. Clair, Hiram Chism, Robert Trotter, S. M. Fisher, Robert Harris, Albert Tinker, N. M. Mitchell, Louis Miller, Wm. Joshenberger, Henry C. Haney, Edward Hunt—

Who took their seats in the jury-box, and, after hearing a portion of the evidence and there not being time to further progress in the trial of this cause, they were permitted to seperate, under the instructions of the court, until to-morrow morning at 8½ o'clock.

19 THURSDAY, *May* 30*th*.

(Opening order omitted.)

On this day come- the plaintiff, Gerhard Shoemaker, and by his attorney, Geo. A. Grace, Esq., and come the said defendant-, by their attorneys, Mess. Clayton, Brizzolara & Forrester, and now come the jury heretofore empannelled for the trial of this cause, to wit, Ed. D. Brogan, Henry St. Clair, Hiram Chism, Robert Trotter, S. M. Fisher, Robert Harris, Albert Tinker, N. M. Mitchell, Louis Miller, Wm. Joshenberger, Henry C. Haney, Edward Hunt, who took their seats in the jury-box, and, after hearing fu-ther evidence and there not being time to fu-ther progress in the trial of this cause, they were permitted to seperate, under the instructions of the court, until to-morrow morning, 8½ o'clock.

FRIDAY, *May* 31*st*.

(Opening order omitted.)

On this day come- the plaintiff, Gerhardt Shoemaker, in his own proper person and by his attorney, Geo. A. Grace, Esq., and come the said defendant-, by their attorneys, Mess. Clayton, Brizzolara &

Forrester, and now come the jury heretofore empannelled for the trial of this cause, to wit, Ed. D. Brogan, Henry St. Clair,
20 Hiram Chism, Robert Trotter, S. M. Fisher, Robert Harris, Albert Tucker, N. M. Mitchell, Louis Miller, Wm. Joshenberger, Henry C. Haney, Edward Hunt, who took their seats in the jury-box, and, after hearing the balance of the evidence and there not being time to further progress in the trial of this cause, they were permitted to seperate, under the instructions of the court, until tomorrow morning, 8½ o'clock.

SATURDAY, *June 1st.*

(Opening order omitted.)

On this day come- the said plaintiff, Gerhardt Shoemaker, in his own proper person and by his attorney, Geo. A. Grace, Esq., and come the said defendant-, by their attorneys, Mess. Clayton, Brizzolara & Forrester, and now come the jury heretofore empannelled for the trial of this cause—

Ed. D. Brogan, Henry St. Clair, Hiram Chism, Robert Trotter, S. M. Fisher, Robert Harris, Albert Tinker, N. M. Mitchell, Louis Miller, Wm. Joshenberger, Henry C. Haney, Edward Hunt—

Who took their seats in the jury-box, and, after receiving the charge of the court and hearing a portion of the argument of counsel and there not being time to further progress in the trial of this cause, they were permitted to seperate, under the instructions of the court, until Monday morning, 8½ o'clock, June 3rd, 1889.

21 MONDAY, *June 3rd*, 1889.

(Opening order omitted.)

On this day come- the plaintiff, Gerhardt Shoemaker, in his own proper person and by his attorney, Geo. A. Grace, Esq., and come the said defendant-, by their attorneys, Clayton, Brizzolara & Forrester, and now come the jury heretofore empannelled for the trial of this cause, to wit—

Edward D. Brogan, Henry St. Clair, Hiram Chism, Robert Trotter, S. M. Fisher, Robert Harris, Albert Tinker, N. M. Mitchell, Louis Miller, Wm. Joshenberger, Henry C. Haney, Edward Hunt—

Who now took their seats in the jury-box, and, after hearing the bal. of the argument of counsel, retired to consider of their verdict, and after a short time returned into court the following verdict, to wit:

"We, the jury, find for the plaintiff, and assess the damage at ($8,000.00) eight thousand dollars."

(Signed) LOUIS MILLER, *Foreman.*

THURSDAY, *June 6th.*

On this day come the said defendant-, by their attorneys, Mess. Clayton, Brizzolara & Forrester, and file motion to set aside the verdict of the jury and for a new trial in this cause.

22 THURSDAY, *June* 13.

On this day come the plaintiff's attorneys, Mess. Marcum & Grace, and file their lien upon judgement in this cause for their services as attorneys for plaintiff in the sum of two thousand dollars.

TUESDAY, *July 9th.*

On this day come the plaintiff, by his attorneys, Geo. A. Grace and J. C. Byers, Esq., and moves the court for judgement in this cause against the defendant, The St. Louis & San Francisco Railway Co.

And it appearing from the records of this court that on the 3rd day of June, 1889, a jury duly selected, empannelled, & sworn to try the issue joined and a true verdict render according to law and the evidence, returned into court here a verdict in favor of said plaintiff, and assessed his damage at eight thousand ($8,000.00) dollars, and, the court being well and sufficiently advised in the premises, it is considered, ordered, and adjudged by the court that the said plaintiff, Gerhardt Shoemaker, do have and recover of and from the said defendant, The St. Louis & San Francisco R'y Co., the said sum of eight thousand dollars ($8,000.00), with interest on the same from this date until paid at the rate of six per cent. per annum, and all his costs in this cause laid out and expended, and that he have execution therefor.

23 THURSDAY, *July 25th.*

On this day come the said defendant, by their attorneys, and file demurrer to complainant's complaint and supplemental complaint. Said demurrer coming on to be heard and the court being well and sufficiently advised in the premises, doth overrule the same; to which the defendant at the time excepted; and whereas this order was made on the 28th day of May, 1889, and omitted to be entered of record—

It is ordered by the court that the same be entered *nunc pro tunc.*

24 In the United States Circuit Court for the Western District of Arkansas.

GERHARD SCHUMACHER, Plaintiff,
vs.
THE SAINT LOUIS AND SAN FRANCISCO RAILWAY COMPANY.

Be it remembered that on the trial of this cause in the above-entitled court, at its regular May term, 1889, plaintiff in said cause, to wit, Gerhard Schumacher, to maintain the issues on his part, introduced the following witnesses, who, being sworn, testified as follows:

Gerhard Schumaker.

(By Mr. GRACE:)

Q. What is your name?
A. Gerhard Schumacher.

Q. What is your first name?
A. Gerhard.
Q. Mr. Schumacher, in what country were you born?
A. I was born in Prussia.
Q. When did you come to America?
A. My parents come in 1866, when the war was over there. My fathe- come from there in 1866—when the war was there in 1866. He was tax collector. About five years ago I came to this country.
Q. When did you come to the Choctaw nation?
A. About two years ago, and was working on the road.
Q. That was while the road was being constructed there?
A. I was working in St. Louis.
Q. And came there?
A. They sent me out from St. Louis.
Q. How long did you work for the railroad in the Choctaw nation?
A. About one month, and then came another man and I worked for him about a month.
25 Q. When you were working for the first man what did he pay you?
A. I paid 3.50 for board, and he pay me $1.50 a day.
Q. When working there you hired to another man?
A. Yes, sir; he was the second contracter, Mr. Donahoe.
Q. Who next?
A. After I commenced to work for Mr. McMullen he took me out and said he would give me $1.75, and I come with him. He gave me passes. He say he pay me $1.50 a day, but I would not work for that.
Q. You hired at $1.75 a day?
A. Yes, sir; and $4.00 a week board.
Q. Where did you go to work?
A. Down on the road.
Q. Do you remember the station?
A. I believe you got it on your paper. I don't know the name right now.
Q. Tuscahoma?
A. No.
Q. Talihina?
A. No.
Q. Below Tuscahoma?
A. Yes, sir.
Q. What were you working at there?
A. I was at work with a surfacing gang. We have to take out gravel and put it between the ties.
Q. How many men in the gang?
A. Eighteen men.
Q. When you first went to work that road?
A. Between eighty and a hundred when I first commenced.
Q. Where did you get your gravel?
A. From near Tuscahoma. There was a gravel pit there.
Q. How long did you work at Tuscahoma?

26 A. About three weeks, and after that I was working at the ——, and Mr. —— said he would pay me and he put eighteen men out. We come from the next station, sixteen miles from Tuscahoma; our gang was small and he took about eighteen out to go to Tuscahoma.

Q. Then you went to Tuscahoma?

A. Yes, sir.

Q How long did you stay there?

A. About two weeks.

Q. At the same kind of work, surfacing?

A. Yes, sir; the train took us to work and bring us back to dinner. We stopped in the section-house.

Q. Commence and tell us how you came to go to Talihina.

A. It was Sunday morning, the third of July. They told us to go to work. They got to Talihina and got a little way from Talihina. We took five loads of gravel.

Q. How far is Talihina from Tuscahoma?

A. Sixteen miles.

Q. North?

A. Yes, sir; this was as we go. The cars stopped and we did not know anything about it that they make a running switch. There were ten cars on the main track. There was a fellow by my side and he take my arm and he could no hold me and I fall off and fall under the wheel.

Q. What made you fall off?

A. I could not hold myself.

Q. What made you fall?

A. The cars came together and I could not hold myself and that fellow could not hold me. They make twenty-five miles an hour, and Pat. Kinney told me so, and Kinney cut my boots off. He was my foreman. He come right away and cut my boots off.

27 Q. When was it that he first told you that they were making twenty-five miles an hour?

A. Right away.

Q. Right there?

A. Yes, sir.

Q. You were sitting on the cars when this shock come; you have been on the cars a great deal; you have seen a great deal of switching?

A. Yes, sir.

Q. I will ask you if that was unusually hard or was it common.

A. I don't know anything about it. The bell did not ring.

Q. You felt the shock?

A. I was sitting on the car. I could not hold myself. I had fallen down. My foot was that way (showing).

Q. You felt the shock?

A. Yes, sir.

Q. You know something about how hard it was?

A. I do not know anything about it.

Q. Was that a light shock?

A. No; it was a heavy shock.

Q. Was that what knocked you off?
A. Yes, sir.
Q. Where did you fall?
A. When I was hurt Smith was holding — with one hand and I fell under the car—under the wheel.
Q. Which side?
A. The left-hand side.
Q. That was the westerly side?
A. Yes, sir.
Q. Where did you fall to?
A. On the rail.
Q. The wheel ran over you?
A. Yes, sir; over my foot. A doctor there wanted to cut my foot off and I wouldn't let him.
28 Q. I suppose you was laid down?
A. They made a little tent; at night the passenger came along, and I go to Fort Smith.
Q. Did those other two men fall off?
A. In the caboose?
Q. The two with you, did they fall?
A. They fell back, but did not fall off.
Q. While you were there immediatelt after was anybody sent with you?
A. Mr. Smith went with me and Mr. Thomas Riley, and he stayed with me two days.
Q. Did you see anything of Pat. Kinney down there?
A. Kinney came and got a knife and cut my boots off.
Q. When was it he told you they were running twenty-five miles an hour, at that time?
A. At the same time.
Q. Did you see anything of the brakeman after you got hurt?
A. No; I did not see anything at all of him.
Q. Of Gifford?
A. No.
Q. You did not talk with Gifford at that time?
A. No.
Q. How many wheels ran over you?
A. Only one.
Q. Do you know which car wheel that was; whether it was the wheel of the car you were riding on?
A. It was the next car. I fell off and jumped the best I could. The next car run over me and took three toes off; that is all that touched me, and my foot was mashed, too.
29 Q. The other foot was mashed, too?
A. Yes, sir.
Q. You were sitting here and these cars run this way (showing); were you in the first car?
A. The first car to the caboose—five cars.
Q. Four gravel cars before you beside the one you were sitting on?
A. Yes, sir.

Q. They took you in the depot?
A. They left me there until the passenger came.
Q. What time was that?
A. Half past ten o'clock. Dr. Phillipd he speak to me at St. Charles hotel. They did not do anything with me. The next morning I was sick. I lay there fourteen days; then went to St. John's hospital, and I lay there two months, and I ask him is my leg right, and he say I was not.
Q. You went to a doctor in St. Louis?
A. Yes, sir; at the county hospital, at five o'clock in the night. In three weeks they make operation and cut off piece. Four or five weeks after that he say there is a bad bone in there yet, and took of- another piece.
Q. How many times did they cut off your leg?
A. Three times.
Q. Where were you when it was first cut off?
A. In the Saint Charles hotel.
Q. Down here near the depot?
A. Yes, sir.
Q. After the first time they sent ylou to Saint Joseph's hospital?
A. Yes, sir, Im stayed there four months—nearly four months in Saint Louis.
Q. I suppose you suffered a great deal?
A. I believe so.
30 Q. I will ask you if before this accident you had not been a healthy man.
A. Yes, sir; I worked Sunday and every day.
Q. Since this are you able to do much work?
A. No; I couldn't do anything at all.
Q. Before that time you made as good wages?
A. I made $1.75 a day.
Q. How old are you?
A. Thirty-two years old the 16th day of May.
Q. I believe this accident occurred——
A. The third of July, 1887.
Q. You were about thirty years old then?
A. The 16th of May I was thirty years old.
Q. Who came with you from Talihina up here?
A. Pat. Kinney—he was the foreman of the gang—and Jack Goodwin.
Q. Did Kinney come all the way up here to Saint Charles hotel?
A. No; Ferdinand Smith and Jack Goodin came.
Q. Ferdinand Smith, was that the man there at the time you got hurt?
A. Yes, sir.
Q. Was Goodwin working?
A. No.
Q. He had been working on the road?
A. He was section boss.
Q. Pat. Kinney was your foreman at that time?
A. Yes, sir.

Q. He did not come on with you?
A. No; he come on to Tuscahoma.
Q. Do you know where Smith is now?
A. No; he left Fort Smith to go to St. Louis. I wrote to my lawyer.
31 Q. I will ask if you have made an effort to find him as a witness.
A. I tried to get him, but could not find him.
Q. You know a man named Burton?
A. Yes, sir.
Q. You saw Burton here several times after you got hurt?
A. Yes, sir.
Q. Do you know where Burton is?
A. No.
Q. Cannot find him?
A. No.
Q. You have lost track of him?
A. Yes, sir.
Q. Do you know anything of where those cars standing on the side track at Talihina come from?
A. No.
Q. When you come from Tuscahoma they were on the side track?
A. Yes, sir.
Q. How many brakeman were there on your train?
A. I only know Mr. Gifford.
Q. I believe you say you did not see these cars coming?
A. No; I did not see anything at all.
Q. Were the men in the habit of riding on the gravel cars?
A. Yes, sir.
Q. Did you have any orders against it?
A. No; there were eighty or a hundred men, and there was no room in the caboose, and they put us on the gravel train, and we had to stay here; and when I got hurt I put gravel this way (showing) and I fell off.
Q. When you first went to work there were about eighty men?
A. Between eighty and a hundred.
Q. When you went in at night they would swarm up forward?
A. Yes, sir.
32 Q. What were you going to do—unload that gravel?
A. Yes, sir.
Q. Were you a shoveler?
A. Yes, sir.
Q. You were going to Tuscahoma to unload that gravel wherever they required you to unload it?
A. Yes, sir.
Q. Along the track? It was near the depot where you stopped?
A. Yes, sir.
Q. There was no obstruction—nothing to hinder them from seeing you?
A. They saw me and sent for the doctor to cut my foot off.

Q. Where was Pat. Kinney sitting?
A. On the front platform of the caboose.
Q. You were right before him on the next car?
A. Yes, sir.
Q. Nothing to hinder him from seeing you?
A. No; he did not say anything at all to me.
Q. Where did the conductor ride mostly?
A. On some cars in front.
Q. Do you know who coupled the cars on that occasion?
A. I do not know anything about that.
Q. Do you know who generally does that?
A. I believe the brakeman.
Q. If there was only one brakesman and the conductor and the brakesman was off on another train, that would only leave the conductor there?
A. Yes, sir.
Q. Then he would be the only man there to make the coupling?
A. Yes, sir.
33 Q. Do you remember how many were on the gravel train?
A. There were about five in the caboose and the ballance on the gravel train.
Q. Did you ever have any orders against riding on the cars?
A. No, sir.
Q. When there were eighty or a hundred men; there was no other place to ride, was there?
A. No, sir.
Q. Did you ever hear of any regulations against riding on the cars?
A. No, sir; never.
Q. Have you ever been down there since this accident at Talihina?
A. No, sir.
Q. You do not know how far it was from the head switch?
A. No, sir.
Q. You do not know the grade?
A. No; I do not know anything about that.
Q. Who was the conductor on the train?
A. I believe it was Burke.
Q. Do you know the name of the engineer?
A. No; I do not know him.
Q. We lay our damage at fifteen thousand dollars; do you think it worth that?

Question objected to and question withdrawn.

Q. How much do you think you have been damaged by this injury?
A. I think twenty-five thousand dollars.

Cross-examination.

(By Mr. CLAYTON:)

Q. How long have you been in this country?
A. Well, I have been here a little over five years.

Q. Are you a naturalized citizen of the United States?
A. Yes, sir; I got my papers out.
34 Q. You are a citizen of the United States?
A. Yes, sir.
Q. You say this was on Sunday?
A. Yes, sir; at nine o'clock.
Q. What day?
A. 3rd July, 1887.
Q. At any rate, it was Sunday?
A. Yes, sir.
Q. There were about eighteen men on the gang?
A. Yes, sir.
Q. How many in the caboose?
A. About five in there.
Q. About thirteen on the cars, then?
A. Yes, sir.
Q. Was any of the thirteen thrown off?
A. They fell off on the side.
Q. Do you know any man thrown off but you?
A. There was no man thrown off but me.
Q. No man out of the thirteen but you?
A. No, sir.
Q. Was the car running or standing still?
A. Standing still.
Q. When the other train run down to it?
A. Yes, sir.
Q. The jar threw you off and the train run over your foot and cut off three toes?
A. Yes, sir; it did not cut them off, but hurt it, and my other foot was mashed, too.
Q. Which car was you on?
A. On the first car to the caboose.
35 Q. Was you on the car that the other car run against?
A. No, sir.
Q. There was a caboose there, wasn't there?
A. Yes, sir.
Q. You did not get into the caboose?
A. No, sir.
Q. How far were you sitting from the end of the car?
A. Witness shows.
Q. Right at the end of the car?
A. Yes, sir; I got a good place to sit in there, my legs hanging outside the car—hanging out here.
Q. You were on the end of the car next to the caboose?
A. Yes, sir.
Q. Were any cars ahead of you?
A. Four cars.
Q. And the train backed up and you tu-bled over here and your foot got cut?
A. Yes, sir.
Q. How many people were on the car with you?

A. About six.
Q. Where were the other seven sitting?
A. On the other cars above.
Q. On the cars next to where it struck?
A. Yes, sir.
Q. You were going north?
A. Yes, sir.
Q. Coming this way?
A. Yes, sir.
Q. There were other cars up north of you?
A. Yes, sir.
Q. There were about four cars ahead of you?
A. Yes, sir.
Q. You think there — about five men in the caboose?
36 Q. These cars were all loaded?
A. Yes, sir; they were loaded.
Q. You got on so as to be ready to go to work?
A. Yes, sir.
Q. You knew that they were going to couple these cars?
A. Yes, sir.
Q. When you got on that car didn't you know the engine was to — coupled to it?
A. No, sir.
Q. The engine was taken off the train?
A. Yes; but I didn't know what they were agoing to do.
Q. You knew they would put it on again?
A. I don't know.
Q. Were you asleep?
A. No, sir.
Q. Were you watching?
A. No, sir.
Q. How long did you sit there?
A. Five or ten minutes.
Q. How is it that you did not know that they were agoing to put the engine on? How did you know the engine was not headed to it?
A. I don't know.
Q. You didn't know that the engine was taken from it while you were sitting there?
A. No; I didn't know anything.
Q. They were making a switch?
A. Yes, sir.
Q. How do you know that?
A. The engine stopped and pushed the cars together.
Q. Where was the engine?
A. It stopped in there.
37 Q. You said that you did not know that they took the engine from the train, didn't you?
A. Yes, sir.
Q. Then you knew before they started again that there would have to be some coupling done?

A. Yes, sir.
Q. How was it you were not watching?
A. I saw the engine was there and the cars come together.
Q. They have got to go down the track to get your train?
A. Yes, sir; but the engine stopped.
Q. Did you ever see a coupling when there was no shock?
A. No; never before.
Q. You never saw a coupling where there was no shock?
A. No, sir.
Q. You never felt it before?
A. No, sir.
Q. Mr. Schumacher, there is a train (showing), here comes another down to make a coupling. Don't it always make a shock?
A. Yes, sir.
Q. Always does?
A. Yes, sir.
Q. You could not make a coupling without being more or less shocked, could you?
A. No; but that was too much.
Q. I know you have said that. You have said it a hundred times. It don't make it any better by saying it over. I know how you feel. You want to get all you can. I don't blame you. You admit when a coupling is made there is always a shock?
A. No, sir.
Q. Never?
A. None before I was hurt.
Q. At other times?
A. There never was before.
38 Q. The car stands perfectly still; stands right there, does it?
A. No, sir.
Q. And there is no shock?
A. No, sir.
Q. Don't you think you are rather pushing this a little when you say they can make a coupling without making a shock?
A. None at all.
Q. I do not know how they could without getting a shock.
A. That was a big shock.
Q. Are you right sure you were not asleep?
A. No, sir; not all.
Q. Did you see when the other cars came down?
A. No; my partner held my arm and let go to hold himself onto the brakes.
Q. The first thing you knew anything about it was tumbling off, was it?
A. Yes, sir.
Q. You wasn't watching to see if they made a coupling or not?
A. No.
Q. How long in your life have you been working on the railroad?
A. About four months.

Q. That is, during your life?
A. Yes, sir.
Q. For the San Francisco road about one month?
A. Yes, sir; on the surface gang about one month and three days; I worked for the company about one month and three days.
Q. You worked about one month and three days surfacing?
A. Yes, sir; I took gravel off and extended the ties and everything like that.
Q. How far is it from Tuscahoma to Talihina?
39 A. Sixteen miles.
Q. You got your gravel at Tuscahoma and then went to Talihina?
A. Yes, sir.
Q. Did you ride all of the way?
A. Yes, sir; on the same car.
Q. When they got to Talihina they stopped and ran you on a side track?
A. Yes, sir.
Q. They did that to get some cars?
A. Yes, sir; about ten cars, and made a running switch.
Q. How did you know they made a running switch? Did you see those cars?
A. Yes, sir.
Q. You saw the engine was going from the cars?
A. Yes, sir.
Q. You said you didn't see that?
A. I saw the engine there.
Q. Were you watching there?
A. Yes; I was when I fell off; I saw an engine was there.
Q. After you fell off you saw that?
A. Yes, sir.
Q. Didn't see that before?
A. No, sir.
Q. Because you were not watching?
A. No; I did not know anything about what they were going to do.
Q. After you fell off you saw the engine?
A. Yes, sir.
Q. That is the reason you saw they were making a flying switch, is it? Why didn't you watch to see what was going on there?
A. They told us to go to work. Why for I have to watch?
Q. You didn't have to watch?
A. I thought we were going to work right away.
Q. The reason you gave me why you did not watch was "why for you have to watch;" you wanted to go to work there?
40 A. Yes, sir; I wanted to work there.
Q. The fact is, you didn't watch, didn't see anything coming on, and knew nothing until you fell. All this is right, ain't it?
A. Yes, sir.
Q. It was Dr. Miller come to see you, wasn't it?
A. Yes, sir.

Q. He wanted to cut your foot off, and you wouldn't let him?
A. Yes, sir.
Q. Who cut your leg off here?
A. Dr. Bailey and Philip and Johnson and two others. I do not know their names.
Q. Where were you, at the St. Charles hotel?
A. Yes, sir.
Q. Dr. Bailey had charge?
A. Yes, sir.
Q. He was the leading doctor?
A. Yes, sir.
Q. Dr. Bailey live*w* in this town?
A. Yes, sir; on Seventh street.
Q. Did you pay Dr. Bailey for the work?
A. No; I didn't pay. At that time I had thirty-two dollars coming to me and I speak to him and tell him I want something to do.
Q. I will ask you if the railroad paid for the services.
A. I don't think so.
Q. Did you pay for your board at the hotel or did the railroad pay for your board?

Question objected to and withdrawn.

Q. How long were you at the St. Charles?
A. Fourteen days.
Q. And at St. Joseph's hospital three or four months?
41 A. About four months and went to St. Louis.
Q. Why wouldn't you let the doctor amputate your leg at first?
A. I was too sick. I didn't know anything about it.
Q. You told me you wouldn't let him do it.
A. The doctors was there, and when I woke up the leg was gone.
Q. You would not permit it at first when Dr. Miller wanted to cut it off?
A. I would not let him on that Sunday take my leg off?
Q. You are thirty-two years of age?
A. Yes, sir.
Q. Are you married?
A. No, sir.
Q. Have you any property?
A. I have nobody here. I got my parents in the old country.
Q. Have you got any property?
A. No.
Q. Never laid up anything?
A. No, sir.
Q. Are you extravagant? Do you pay money out extravagantly?

Question objected to and objection overruled. Exception taken by counsel for plaintiff.

A. As long as I have been here I have got good clothes, and I spend my money for such things.
Q. You are not a drinking man?

A. No, sir.
Q. Nor run with bad women?
A. No, sir.
Q. How is it that you have never laid up anything?
A. I cannot lay up anything with so little wages. I work in St. Louis for twenty dollars a month and that goes very quick.
42 Q. You cannot lay up anything because you get little wages?
A. No; the wages I get not high and I could not save something.
Q. You have not been getting *1* $1.75 a day very long?
A. Only a month.
Q. Who were the two men sitting with you?
A. Burton and Smith.
Q. Where are those two men?
A. They were here at the time and went.
Q. Did you subpœna them?
A. No, sir.
Q. What were their names?
A. Ferdinand Smith and Burton and Gus. Witham were the first witnesses with me.
Q. Mr. Schumacher, you say there was but one brakeman on that train?
A. I don't know whether there was two or three.
Q. You know Mr. Gifford?
A. Yes, sir.
Q. There might have been another?
A. I don't know.
Q. They generally have two brakemen on *an* a train?
A. I could not tell; I don't know.
Q. Don't they usually have two?
A. I don't know anything about that.
Q. You know Pat. Kinney, you say?
A. Yes, sir.
Q. You saw him on the caboose?
A. Yes, sir.
Q. Do you know P. F. Byer?
A. Yes, sir.
Q. Was he there?
A. Yes, sir.
Q. H. L. Young?
A. No, sir.
—. Pat. Kinney?
A. Yes, sir.
Q. What was he?
A. Foreman.
—. And Gifford?
A. He was brakesman.
Q. P. L. Dockman?
A. Not by name—oh, yes, I do.
43 Q. Pat. Kinney*n* was foreman?
A. Yes, sir.

Q. Who was engineer?
A. If I see him I would know him.
Q. Did you know Riley?
A. Yes, sir; he was there.
Q. Mr. McMullen?
A. Yes, sir; there is another one—Jack Goodwin.
Q. J. P. McKenna is a car-repairer, isn't he?
A. I don't know what he is.
Q. He was there?
A. Yes, sir; and Jack Goodwin was there, too; you did not call him.
Q. You have said that he is your witness.

Redirect examination.

(By Mr. GRACE:)

Q. You started to tell Judge Clayton something about you had some money due you from the road at the time the doctors were there. There was something said about pay; what was it?
A. At the time there was thirty-two dollars coming to me, and I speak to the doctor, and he said——
Q. (Interrupting.) Never mind that.
Q. You wanted to get you- money at that time and they wouldn't let you have it?
A. No, sir.
Q. If anybody paid Dr. Bailey you did not know anything about it?
A. No; nobody paid him.
Q. Before this time you were employed in a hotel in St. Louis at twenty dollars a month?
A. Yes, sir.
Q. Also board; you got your board clear?
A. Yes, sir.
Q. I believe the witnesses who spoke to you about this were Burton and Smith?
A. Yes, sir.

44 Recross-examination.

(By Mr. CLAYTON:)

Q. You sais something about Burton being in Cincinnati?
A. I don't know where he is.
Q. Did you write to Smith?
A. Yes, sir.
Q. Where?
A. At St. Louis.

(By Mr. GRACE:)

Q. Did you not go to where he was and inquire for him?
A. Yes, sir.
Q. Did you not have letters written to the Nation?
A. He goes to St. Louis and I can't find him; he was gone off.

JOHN GOODWIN, called in behalf of the plaintiff and being sworn, testified as follows:

(By Mr. GRACE:)

Q. What is your name?
A. John Goodwin.
Q. Where do you live?
A. At Fort Smith.
Q. How long have you lived in Fort Smith?
A. Four or three years; something about that.
Q. Did you work on the railroad while the new road was being built to Paris?
A. Yes, sir.
Q. How long did you work on the road?
A. Back and forth, three years.
Q. Part of the time after it was built?
A. Yes, sir.
Q. Did you see anything of Schumacher there?
A. Yes, sir.
Q. What position did you hold on the road?
A. Laborer.
Q. Wasn't you a foreman?
A. Only for a few days.
45 Q. Where did you see Schumacher first?
A. Between Tuscahoma and Talihina.
Q. Were you at the depot at Talihina at the time he got hurt?
A. Yes, sir. He was there working in the company's employ at the time he got hurt, on the 3rd of July two years ago in the forenoon. He was sitting on the end of a car, and the other cars bumped against him and the accident was caused from that.
Q. Bumped too hard against him?
A. That is right.
Q. Did you see those cars before the shock?
A. Yes, sir; I saw them.
Q. How fast were they running?
A. Couldn't tell; impossible for me to say how fast.
Q. You saw them strike, did you?
A. Yes, sir.
Q. Did they strike with some force?
A. Considerable more so than usual and harder than they ought to.
Q. Where were you standing at the time?
A. I was in the caboose at the time they struck together; I was not on the ground.
Q. Did you go up to Schumacher after he fell off?
A. Yes; I walked up there. I had a good ways to go.
Q. Did you see anything of Gifford there, the brakesman?
A. Yes.
Q. Did he say anything about the way the accident happened?
A. Hearsay don't amount to much.
Q. What did he say?

Question objected to as being hearsay.

46 Q. How long from the time that the cars run together until you went over to him, do you think?

A. Maybe four or five minutes; as soon as the accident happened.

Q. State what Gifford said at the time. Did he make any remarks?

Question objected to on the same grounds, and the court suspends decission until the attorneys get their authorities.

Q. State to the jury all that you know in regard to the method of making that switch.

A. The cars had been taken off the track, and one bumped against the other.

(By Mr. CLAYTON:)

Q. Did you see it?

A. Yes, sir; and it struck harder than it ought to. The engine was loose from the cars. They were cut loose at the time it struck the other cars on the main track.

(By Mr. GRACE:)

Q. I suppose you couldn't say what the grade is there?

A. No. I know it was down grade as to the way the cars were coming.

Q. Did you come up with the plaintiff on the train?

A. Yes, sir. The same night of the injury we came up to Fort Smith and helped him to the St. Charles hotel.

Q. From the time he was struck until the time he left on the train where was he?

A. In the depot most of the time and with the doctors part of the time — he was in the depot.

Q. Where did you get on the train?

A. At Talihina.

Cross-examination.

(By Mr. CLAYTON:)

Q. You are living in Fort Smith?

A. Yes, sir.

47 Q. How long have you been living here?

A. Back and forwards three years. I came in from the Frisco some three years ago.

Q. How long have you been working for the Frisco?

A. Going on three years.

Q. Are you working for them now?

A. No.

Q. How long since you worked for them?

A. What time in the month is this—the 17th is the last I done for them, if I recollect right.

Q. At the time this accident happened you were working?

A. Yes, sir.

Q. What is your employment?
A. Laborer.
Q. Were you surfacing?
A. Yes, sir.
Q. This train that he was on had gravel on it, was it?
A. Yes, sir.
Q. From where?
A. Tuscahoma gravel pit.
Q. Where were you taking it to?
A. Don't know.
Q. Was you on that train?
A. Yes, sir.
Q. Were you in the caboose?
A. Yes; at the time the car struck.
Q. Inside or on the platform?
A. On the inside; I didn't want to be on the platform; on the inside, just as I stated.
Q. How many were in there?
A. Don't know.
Q. About how many?
A. Maybe two or three, and there might be a dozen.
Q. You don't know?
A. Don't know.
Q. How many on the train of these gravel cars?
A. Don't know.
48 Q. You call the cars loaded with gravel flats, don't you?
A. Yes, sir.
Q. Is there another kind of box cars?
A. Yes.
Q. Any on the train?
A. Don't know. There was a caboose; don't know anything about flats. To the best of my opinion there was not. I don't remember. I tell what I know.
Q. Do you know what the train stopped at Talihina for?
A. No, sir.
Q. Was the train side-tracked there?
A. On the main track.
Q. The train Schumacher was on was on the main track?
A. Yes, sir; on the main track.
Q. You are sure of that; you are not mistaken?
A. No; I am not mistaken. Where the rest was I don't know.
Q. You don't know where the cars were taken from?
A. Don't know.
Q. I guess the r-ason was because you were in the caboose?
A. I was on the flats a little before.
Q. The reaso- you don't know is because you were in the caboose?
A. It was out of my line of business.
Q. Was the door open or shut?
A. Now you have got me again. Very likely.
Q. Did anybody halloo?

A. I don't know; I always look out for myself.
Q. Do you know Mr. Kinney?
A. Yes.
Q. Do you know Mr. Riley?
A. Yes.
Q. Were they there at the time?
49 A. They were somewhere on the train; they were running the train; they ought to be there; they had charge of her.
Q. You did not belong to this gang of men, did you?
A. No; not at that time.
Q. Were you working for the road at that time?
A. Yes, sir.
Q. But not with this gang?
A. No, sir.
Q. Who was your foreman?
A. Mr. Kinney or Mr. Riley, who I was working for.
Q. Was it a safe place where he was sitting?
—. No, sir; I wouldn't consider it a safe place. For a fact, there is no safe place on such a track as they have got.
Q. How does it compare with other places?
A. There would be safer places than that.
Q. Was not McKenna on the caboose?
A. He ought to be.
Q. Wasn't he on the caboose?
A. He was on the train.
Q. Did you see Schumacher when he fell?
A. Yes.
Q. Where was he sitting?
A. On the end of the car.
Q. He was sitting on the end of the car. It was a flat car, wasn't it?
A. It was a car loaded with gravel.
Q. On the end next to the caboose or the other one—the end from the caboose?
A. The end from the caboose.
Q. Were his feet hanging over?
A. Don't know; very likely.
Q. Well, were they?
A. Don't know.
50 Q. When it jolted he fell down? That's right?
A. Correct.
Q. Mr. Goodwin, you are certain that he was sitting at the end, and not at the side, are you?
A. I've repeated that twice.
Q. How many cars from the caboose to where he was?
A. Couldn't tell.
Q. Was he on the car next to the caboose?
A. I didn't say so. How many cars between I don't know. I know he was not on the car next to the caboose. There might have been two or three or four; I don't know how many. I didn't pass any remarks at the time; a man don't, you know.

Q. Well, if you walked back from where he was, you ought to be able to say whether there were two or three cars.
A. I do have an idea; but I am going to tell what I know.
Q. Which way was he facing?
A. Towards Fort Smith.
Q. From the caboose?
A. Yes, sir.
Q. You walked back and got on the caboose, and then the thing occurred? Is that the way?
A. No; I said I passed down and got on the caboose. Before this thing happened was when I saw him.
Q. Did you say anything to him?
A. No. I knew the man and I saw him; that was all—sitting there as I passed, and I go on.
Q. Might it not be that he was sitting on the car and the caboose ran over him?
A. It might be.
Q. But if so, you were mistaken?
A. Badley.
Q. Don't you think he was sitting on the engine?
A. Go ahead.
Q. You really do not know where he was sitting?
A. No. I know he was sitting on the car.
51 Q. He might have been faced to the caboose, might not he?
A. If you want it that way, go ahead.
Q. You really don't know where he was, do you?
A. Yes, sir.
Q. Where?
A. On the end of the car.
Q. Not the car next to the caboose?
A. There is no changing me at all; it is no use of trying.
Q. Who was it that hallooed about the time the caboose struck; you or McKenna?
A. Speaking to me?
Q. Yes.
A. Don't know.
Q. You think you have told all you know?
A. I think I have said all the particulars. The cars struck the cars on ahead, or he wouldn't have fell off.

(By the COURT:)

Q. How many were in the caboose with you?
A. Don't know.
Q. Have you no idea?
A. I don't know; maybe half a dozen.
Q. How many will the caboose hold?
A. A big pile.

(By Mr. CLAYTON:)

Q. Twenty or thirty?
A. All that; maybe more.

(By the COURT:)

Q. Do you know how many were on the cars and in the caboose altogether?

A. I don't know.

Q. You did not belong with Kinney?

A. No.

52 (By Mr. CLAYTON:)

Q. You think as many as thirty or forty could be put on a caboose?

A. I think I would be safe in saying as many as forty men.

Q. Are there not seats in the caboose?

A. Always.

Q. They run a caboose with every freight train nearly, don't they?

A. Are supposed to.

Q. For men to ride on?

A. That is what they are used for.

Q. Isn't it the duty of the *emn* to ride on the caboose—inside?

A. I don't know; don't know anything about the laws. My favourite place is in there.

Redirect examination.

(By Mr. GRACE:)

Q. You knew nothing of rules and regulations and have heard nothing of orders against riding on the gravel?

A. Nothing.

Q. Several men besides Schumacher rode there, didn't they?

A. Yes; several of the crew, but how many I don't know.

Q. You walked by this car, if I understand you?

A. Yes, sir.

Q. When you walked up there, if they were standing still, did you not regard it a place of safety?

A. Oh, yes; when she is standing still I would consider it always safe.

Q. You had been working on the same road for the same company?

A. Yes, sir.

Q. Is it not common where you were for the men to ride on the gravel?

A. Yes; at the same work.

Q. You did not have a seperate gravel train?

53 A. Not that I know of.

Q. You had seen them before riding on the train?

A. As a general thing the *emn* made a favorite of riding outside; it was a cooler place.

Q. No orders against it, were there?

A. Not as far as I know; that is out of my line of business. All I know is, I do a day's work and get pay for it.

Q. Do you know the conductor?
A. Yes.
Q. Do you know Mr. Burton?
A. Yes.
Q. Gifford?
A. Yes. They are careful and good men and seemed to be attentive to their duty.
Q. Very good men?
A. I am very little acquainted with any of them.
Q. Do you know where Burton is now?
A. No; I don't.
Q. Have you seen him around here?
A. Not since I left there.
Q. You have worked a good deal on railroads and have seen a good many switches and couplings?
A. Yes.
Q. I will ask you, to make a switch the way that was made and run the cars back is not negligence.

Question objected to and question withdrawn.

Q. It was unusual and struck harder than it ought to have done, didn't it?
A. Yes.

Recross-examination.

(By Mr. CLAYTON:)

Q. You say they were all safe men?
A. They all sh-wed themselves to me to *as* safe men.
Q. I will ask you if you were sitting on a car with your legs hanging over while being coupled, wouldn't it be your duty to watch it, as a railroad man?

54 Question objected to and question allowed.

A. Me myself would, but it is according to the presence of mind of men.
Q. You would feel it to be dangerous?
A. It is dangerous to be riding on them at all. Every man ought to watch for himself.
Q. Every man ought to watch for himself?
A. Yes.

Redirect examination.

(By Mr. GRACE:)

Q. You didn't know they were going to make a switch, did you?
A. That's right.

(By Mr. CLAYTON:)

Q. If you were stopping on a side track wouldn't you — they were going to make a switch, as a railroad man?

The court adjourned until 2 o'clock p. m.

MAY 29TH, 1889—2 o'clock p. m.

After the argument by counsel as to the admissibility of the remarks said to have been made by Gifford after the accident happened the judge decided that it could go to the jury, although he had doubts as to its competency.

To which ruling the defendant at the time excepted.

(By Mr. GRACE:)

Q. Do you say you saw Gifford, the brakeman?
A. Yes.
Q. Did you hear him say anything?
A. Do you want me to tell what I saw?
A. Yes.
55 A. I saw him working on the brake his best, and his force did not stop it—did not stop the brake.
Q. He came up to where this man was laying. Did you hear him say anything about the brakes?
A. I heard remarks passed that way, that the brakes were not in order.

(By Mr. CLAYTON:)

Q. When did you hear that?
A. Shortly after the man was hurt.

The COURT: You should state that he said it within a fixed time.

(By Mr. GRACE:)

Q. Do you remember who made the remark?
A. No, sir; I don't.
Q. You do not remember whether the brakeman said it or not?
A. No; I heard the remark passed, but don't know who said it.
Q. When were the remarks made?
A. Five or ten minutes after I went up there; somewhere about then.
Q. You just heard the remarks made?
A. Yes.

The COURT: The ruling was upon the objection if this brakeman said so and so. Unless you can bring it down that it was said a short time before by this man or some other man I shall rule out all but that the brakeman tried to stop and couldn't.

Q. You were acquainted with Gifford before?
A. Seen him on the train; that was all; had no acquaintance; knew his face, and that was all.
Q. Do you know where the conductor was at that time?
A. No; I don't; I couldn't say. That is very hard for me to tell; of course around that train somewhere, but where I couldn't tell.

56 PATRICK KINNEY, being called for the plaintiff and duly sworn, testifies as follows:

(By Mr. GRACE:)

Q. Mr. Kinney, where are you at work now—the last week or two?
A. At Stanley.
Q. How long have you been in the employ of the company?
A. About two years.
Q. What sort of work have you been a engaged in?
A. Foreman.
Q. Of what?
A. Foreman of a section gang now.
Q. About two years employed in the company and now foreman of a section gang?
A. Yes, sir.
Q. Are you acquainted with Schumacher here?
A. Yes, sir.
Q. Did he ever work for you?
A. Yes, sir.
Q. You were foreman of the gang he was in?
A. Yes, sir.
Q. How long before he got hurt was he with you?
A. About a month.
Q. Where did he work with you first?
A. At Tuscahoma.
Q. What did he do there?
A. He was a laborer there.
Q. He was a laborer at Tuscahoma?
A. Yes, sir; working on the track.
Q. With a gravel train?
A. Yes, sir.
Q. In whose employ?
A. Sir?
Q. Who employed him?
A. I don't know.
57 Q. He was just sent there and put in your charge?
A. Yes, sir.
Q. You were hired to get gravel and put it on the track?
A. Yes, sir; and sometimes raise a track.
Q. How many men did you have at Tuscahoma?
A. I was allowed twenty-five, but sometimes I did not have them.
Q. Before you came to Tuscohoma how many?
A. About fifty.
Q. No more than these?
A. Maybe a hundred or a hundred and twenty-five.
Q. You sometimes scattered them out?
A. Yes, sir.
Q. The morning Schumacher got hurt where did you start from?
A. The gravel pit.

Q. From Tuscahoma?
A. A mile this side.
Q. Wheere were you going with that load?
A. This side of Talihina.
Q. How far was that from Talihina?
A. About four miles.
Q. When you got there what was done by the train?
A. We had four or five cars of gravel, and it was left on the main track, and I don't know how many cars took out of the side track, and they coupled them together.
Q. Were they loaded cars?
A. Yes, sir.
Q. Loaded with gravel?
A. Yes, sir.
Q. You don't know how many there were?
A. No, sir.
Q. How was that switching done?
A. They went in on the side track and took out the cars?
58 Q. That is, the engine brought up there and attached itself and came out off of the side track onto the main track?
A. Yes, sir.
Q. In order to do that they would have to go a considerable distance, wouldn't they? Suppose they had ten cars to get back, they would have to go a considerable distance to pass the switch?
A. Yes, sir.
Q. (Showing.) Suppose this is the main track and here is the side track and engine stops your train and runs down here and couples on these. In order to get here it has to run away up here in order that those ten cars can get on the main track, and then when it cuts loose they will come back here?
A. Yes, sir.
Q. That is the way they did?
A. Yes, sir.
Q. The engine went on the side track?
A. She had no cars when she went on the side track.
Q. It went far enough north to bring these cars here (showing)?
A. Yes, sir.
Q. Do you know whether the engine cut loose?
A. It was cut loose from the cars on the side track.
Q. What became of those cars?
A. They came down.
Q. How far—until they struck the other cars?
A. Yes, sir.
Q. Where were you when they struck?
A. In the caboose door.
Q. Sitting or standing?
A. Standing in the door of the caboose.
59 Q. Where was Schumacher?
A. I don't know exactly where he was.
Q. You don't remember seeing him about that time?
A. No, sir.

Q. Had you seen him on the trip up?
A. Yes, sir.
Q. Where was he then?
A. On the cars—on one of the flats.
Q. Where had you been riding?
A. On the caboose.
Q. On the platform?
A. In the door.
Q. All the time?
A. When she struck Tuscahoma and when she left there.
Q. You did not consider yourself in danger?
A. No, sir.
Q. You remember of seeing Schumacher, but don't remember exactly where?
A. No, sir; I didn't pay any attention.
Q. Were there many on the flats?
A. Fourteen or fifteen.
Q. How many in the caboose?
A. I don't know.
Q. How many men did you have in the pit?
A. I couldn't say.
Q. There were some fourteen or fifteen on the flats and some in the caboose?
A. Yes, sir.
Q. Did you see Schumacher fall off?
A. No, sir.
Q. How did they strike?
—. Tolerably hard, just the same.
60 Q. Pretty hard; I suppose they came down pretty fast and the further they come the faster they come and struck pretty hard?
A. Yes, sir.
Q. You didn't see Schumacher fall off?
A. No, sir.
Q. Did you hear anybody halloo?
A. Nobody but myself.
Q. What did you halloo?
A. "Boys, look out."
Q. Where were you?
A. Standing in the caboose door.
Q. You could see the train?
A. Yes, sir.
Q. Before or after it struck?
A. Before.
Q. Halloo loud, did you?
A. Yes.
Q. What did you halloo for?
A. I always halloo for the couplings; it may knock some fellow over.
Q. How long before it struck did you halloo?
A. I reckon a minute.

Q. Just before it struck?
A. Fully a minute.
Q. Not much more than started?
A. It is a long switch.
Q. Do you remember what the grade is there?
A. No, sir.
Q. It is down grade?
A. Yes, sir.
Q. You don't know how heavy?
A. No, sir.
Q. Did you go up to Schumacher when he was knocked off?
A. Yes, sir.
Q. How much was he hurt?
A. His knee was hurt here and his foot was hurt.
Q. Did it seem like the wheel had run over his foot?
61 A. I couldn't tell; his knee was hurt and his foot was hurt.
Q. You didn't examine particularly?
A. No, sir.
Q. How many brakemen were on the train?
A. Two.
Q. On your train?
A. Yes, sir.
Q. How many cars?
A. I do not know, sir.
Q. You took five, didn't you?
A. I couldn't tell.
Q. You cannot say?
A. No, sir.
Q. Were you ever a brakeman?
A. No, sir.
Q. Ever an engineer?
A. No, sir.
Q. A conductor?
A. No, sir.
Q. You don't know much about running a train, do you?
A. No; I don't know anything about running a train.
Q. Where were those two brakesmen?
A. One was on the train and the other was on the ground.
Q. Do you know anything about the condition the brake was in on that train?
A. No, sir.
Q. You didn't examine it?
A. No, sir.
Q. Had you and your men loaded these cars on the side track?
A. No, sir.
Q. Do you know where they came from?
A. From the gravel pit, I suppose.
Q. You suppose?
A. Yes, sir.
Q. Do you know how they got there?

A. No, sir.
Q. Your crew had not brought them there?
A. No, sir.
Q. Nor been with them?
A. No, sir.
Q. You say one brakeman was on the cars; do you remember which one?
A. I remember the man, but I don't know his name.
62 Q. Was it Gifford?
A. That is the name.
Q. Did you see whether he was at work trying to stop the train?
A. Yes, sir.
Q. These cars were loaded, I suppose?
A. Yes, sir.
Q. With gravel?
A. Yes, sir.
Q. Do you know how many there was?
A. No, sir.
Q. Several?
A. Several, but could not tell how many there were.
Q. Quite a number of men riding on the gravel; some fourteen or fifteen?
A. I think I had fifteen men that day out; maybe more; I don't know how many.
Q. I understand you to say some fourteen out on the gravel?
A. I don't know exactly.
Q. These men were under whose orders—yours or the conductor's? Who determined where they had to ride?
A. The conductor.
Q. When on the train under whose directions?
A. Mine as to work, but his as to riding.
Q. As to riding you had nothing to do with them?
A. No, sir.
Q. You had not told them not to ride there?
A. Not that particular Sunday.
Q. You knew they were there and did not tell them to the contrary?
A. I did before that several times.
Q. You have been over two years in the employ of the company?
A. Yes, sir.
63 Q. Do you remember immediately after this man was hurt hearing the brakeman say how it come, and that he couldn't stop the train?
A. No, sir.
Q. Where did you go? To where Schumacher was lying?
A. Yes, sir.
Q. What did you do to help him?
A. We picked him up. I got off on the right-hand side, and I went across and helped pick him up.
Q. Did you come up here with him?
A. No, sir.

Q. What did you do with him?
A. Took him in the office—not in the office, but in the house.
Q. In the depot?
A. No, sir.
Q. In the baggage-room?
A. No, sir; in a house across the track.
Q. Did you leave him there?
A. I left a man to take care of him.
Q. Who did you leave?
A. I don't know his name.
Q. Do you know a man by the name of Burton?
A. Not that I know of.
Q. I suppose you don't know all of the names of the men working for you?
A. No, sir.
Q. Do you know who came up here with him?
A. I know his name was German, but I don't remember what it was.
Q. Do you remember whether Goodwin came?
A. No, sir.
Q. You were not there?
A. No, sir.
64 Q. Where did you go?
A. To load gravel up the mountain.
Q. Did you not have some further trouble with the brake up there?
A. Not that I know of.
Q. You don't remember getting of- and scotching the train going up the mountain?
A. No, sir; I never got off.
Q. Do you remember anybody getting off?
A. No, sir.

Cross-examination.

(By Mr. CLAYTON:)

Q. This occurred the 3rd July, 1887?
A. Yes, sir.
Q. You were the foreman of the gang?
A. Yes, sir.
Q. The plaintiff in this case, Mr. Schumacher, there, had worked with you?
A. Yes, sir.
Q. He rode out on the car that day—on one of the flats?
A. Yes, sir.
Q. You had told them frequently before that they must not ride out there, hadn't you?
A. Yes, sir. I do know that I warned them not to ride there, and when they would sit on the gravel I would warn them not to sit there.
Q. Why?

A. Because it is dangerous.
Q. Was not a caboose run for that purpose?
A. Yes, sir.
Q. It is their duty to ride in the caboose, isn't it?
A. Yes, sir; that is what caboose is supposed to be carried for.
Q. How often had you warned the men not to ride outside?
A. Several times.
65 Q. Why is it dangerous there?
A. Because if you fell of- you will fall between the two tracks.
Q. If coupling it jars?
A. Yes, sir.
Q. That is why you had warned them?
A. Yes, sir.
Q. Do you know Mr. McMullen?
A. Yes, sir.
Q. What is his business?
A. General road master.
Q. Did you not receive orders from McMullan not to let the men ride there?
A. Not any more than this—the card tells them not to ride that way.
Q. That is one of the rules of the company?
A. I don't know that it is one of the rules of the company; it is the rule of the foreman. He tries to take care of them.
Q. Had you been instructed anyway not to let the men ride that way?
A. No, sir.
Q. What was it you said awhile ago about the time-card?

Question objected to and withdrawn.

Q. How often had you warned the men not to ride that way?
A. I don't know.
Q. I will ask you if you don't know that they were warned by the conductor that very day.
A. I couldn't tell you.
Q. You rode in the caboose?
A. Yes, sir.
Q. When you saw that this car was about to be coupled you hallooed, "Look out"?
A. Yes, sir.
Q. Did you halloo loud?
A. Yes, sir.
66 Q. Loud enough for them in the next car to hear you?
A. Yes, sir.
Q. A man awake could hear you?
A. Yes, sir.
Q. Do you know where the plaintiff was at that time?
A. No, sir.
Q. If he had been awake he could have heard you?
A. Yes, sir.

Q. That is your custom to halloo when the cars are coupled?
A. Yes, sir; sometimes; it is the foreman's place to look out for them.
Q. It is the duty of the men to be watchful and take care of themselves, isn't it?
A. Yes, sir.
Q. Because there is always a jar?
A. Yes, sir.
Q. The coupling of cars always makes a jar when moved down on standing cars?
A. Yes, sir; especially if the brake is on the hind car.
Q. These men who had charge of this train were careful men?
A. Yes, sir.
Q. There were two brakemen with this train?
A. Yes, sir.
Q. Is it the same upon all roads?
A. Some have two; according to the size of the train.
Q. This was the right number for a train of this kind?
A. As far as I know it was.
Q. One was on the train and you don't know where the other was?
A. He was on the ground, I think.
Q. Do the brakemen do the coupling as well as the breaking?
A. Yes, sir.
Q. One is to have the pin ready to drop in when the train comes in?
67 A. Yes, sir.
Q. That is what they call coupling?
A. Yes, sir.
Q. You don't know where the brakeman was standing, do you?
A. I don't know. I could have seen if I had been looking for him.
Q. Did anybody but you halloo?
A. Not that I know of.
Q. You hallooed as you usually do as the train is coming down?
A. Yes, sir.
Q. You think you had about fifteen men?
A. About fifteen or eighteen.
Q. How many men were in the caboose?
A. I couldn't tell you. I think there were some on the train and some on the gravel, but how many were in the caboose I couldn't tell you.
Q. Was it warm, sunshiny day?
A. Yes, sir.
Q. In July?
A. Yes, sir.
Q. Sunday?
A. Yes, sir.
Q. The men sometimes got sleepy; did you ever find them asleep on the train?
A. If they ever got sleepy they got in the caboose; they hardly ever go to sleep on the works.

Q. When riding backwards and forwards they had nothing to do?
A. No, sir.
Q. They had nothing to do at that time?
A. Nothing, only to sit down and wait until they were ready to go.
Q. The plaintiff in this case was not engaged in any work at that time?
A. No, sir.
Q. There was nothing to engross his attention?
A. No, sir.
68 Q. Mr. Kinney, let me ask you again—the caboose is taken on the train for the men to ride in?
A. Yes, sir.
Q. That is what it is for?
A. That is what it is for.
Q. You have been long enough on the road; you ought to be able to state distinctly, oughtn't you?
A. Yes, sir.
Q. They have no business to ride anywhere else?
A. I couldn't say.
Q. I will ask you if this Mr. McMullan instructed you not to let them ride on the cars.
A. He never gave me those instructions.
Q. What did you mean by saying the instructions were on the time-card?

Question objected to and withdrawn.

Q. There was a rule that they should not ride on the cars. Did you not tell me so?
A. No, sir; not that I know of.
Q. You said you had told them several times not to ride on the cars.
A. No, sir; I said on the gravel cars.
Q. Did you ride on the cars or in the caboose?
A. Both.
Q. Do you make a distinction between riding on the cars and on the corners of the cars?
A. Yes, sir.
Q. Would you think it careless to ride on the corners of the cars?
A. Yes, sir.
69 Q. Suppose he rides close enough to the end and then he tumbles off?
A. He runs his own risk, I reckon.
Q. When this man was on the train were they in charge of the conductor?
A. Yes; I reckon.
Q. When they were at work were they under your charge?
A. Yes, sir.
Q. You had been working for the road, Mr. Kinney, simply as foreman?

A. Yes, sir.

Q. You never rode much, except on construction trains, did you?

A. No, sir.

Q. You were foreman and had been from February to July—9 months?

A. Yes, sir.

Q. Your work is on the road?

A. Yes, sir.

Q. Do you have charge of the men when at work?

A. Yes, sir.

Q. It is not your business particularly to look after them on the train, is it?

A. It is the foreman's business to do the best he can for them.

Q. You did the best you could; was it because of your carelessness that the man was hurt?

A. No, sir.

Q. You halloed when the train was coming?

A. Yes, sir.

Q. I believe I asked you if these gentlemen were not careful men?

A. Yes, sir.

70 Q. Men who understood their business?

A. Yes, sir; as far as I know, they are.

Q. You were with them; you ought to know?

A. Good, careful men, both the conductor and the engineer. I know them personally.

Q. You know them as careful men?

A. Yes, sir.

Q. Cautious and understood their business?

A. Yes, sir.

Q. When the cars came down to couple they struck tolerably hard. Did you not intend to say, "About the same as usual"? Wasn't that what you intended to say? "They struck about the same as — usually did." Wasn't that what you intended to say when you were interrupted?

A. I couldn't tell exactly; I don't remember now.

Q. I reckon you were going to say it struck about the same as usual.

A. I think it struck harder than usual.

Q. You have made an examination of it. What were you going to say when you said they struck about the same?

A. I don't know what.

Q. You say they struck tolerably hard?

A. Yes, sir.

Q. Sometimes they struck that hard and sometimes they didn't?

A. Yes, sir.

Q. That was down grade?

A. Yes, sir.

Q. It is harder to hold on down grade?

A. Yes, sir.

Q. And that was on down grade?
A. Yes, sir.
Q. That was a steep grade, wasn't it?
A. Yes, sir.
71 Q. You saw these cars; did they have the brakes set on them or not?
A. I don't know.
Q. What held them if the brakes was not on them?
A. The brake is always set in the caboose.
Q. And that is what held them there?
A. Yes, sir.
Q. You saw a brakeman ahead?
A. Yes, sir.
Q. Was he doing his duty?
A. Yes, sir.
Q. Was the man between the two cars for the purpose of coupling them, did he get hurt?
A. No, sir.
Q. Nobody got hurt but this man?
A. That is all.
Q. The man between the cars didn't get hurt and the other men didn't get hurt?
A. No, sir.
Q. You hallo-ed to them?
A. I hallooed to my men.
Q. The conductor sometimes does the breaking, doesn't he?
A. Yes, sir.
Q. Not his business?
A. When it suits him. If the brakeman is busy the conductor does the coupling when they come back. I think he was doing it then.
Q. Was it a part of his business?
A. I often seen him do it.
Q. He does it himself; the conductor was doing it in this case?
A. I think he was.
Q. Did you say Smith came with this man here?
A. I don't know exactly; that don't sound like the name.
72 Q. That don't sound like the name?
A. No, sir; it was Schulenberg.
Q. The man's name that came up here with him?
A. I ain't positive. He has a German name. I couldn't tell what his name is now.
Q. How did you get the name of Schulenberg in your head? Is that your time book?
A. Yes, sir.
Q. This is your handwriting?
A. Yes, sir.
Q. This is the book you kept your time-table on?
A. Yes, sir; monthly book.

(By Mr. GRACE:)

Q. See if you had a man by the name of Fred. Smith that month.

(By Mr. CLAYTON:)

Q. Look and see.
A. Yes; F. Smith.
Q. What was he doing on the 3rd, 4th, 5th, 6th, and 7th—Fred. Smith? See if he was at work with you during that time, and was he up here?
A. I expect he was working that Sunday.
Q. And the next day?
A. I don't remember now.
Q. Does the book show that he was working Monday?
A. Yes, sir.
Q. Tuesday?
A. Yes, sir.
Q. Wednesday?
A. Yes, sir.
Q. Thursday?
A. Yes, sir.
Q. Friday?
A. Yes, sir.
Q. Saturday?
A. Yes, sir.
Q. Sunday?
A. Yes, sir.
73 Q. Clear through to the 18th, working at least part of the day?
A. Yes, sir.

Mr. GRACE: Doesn't it show he was working up here?
Mr. CLAYTON: That is so; if he was sent up here he would be on pay.

Q. Who sent this man up here?
A. T. F. Riley.
Q. He is the road master, isn't he?
A. Yes, sir.
Q. If Mr. Smith was sent up here wouldn't he be allowed time?
A. Yes, sir; under orders of him.
Q. If he was up here how does it happen that he has ½ and ¾ days?
A. I don't remember him at all. Sculberg was the man that came up here, as far as I know.

Redirect examination.

By Mr. GRACE:

Q. I will ask you, when the cars are coupled, whether there is always a shock and whether, as the cars are switched back and

coupled, if it is not best for the engine to bring the cars back and couple them without knocking things east and west.

A. Yes, sir.

Q. Is not that the proper way? As a trainman, is not that the proper way so as not to injure anybody?

A. I reckon that is so, but I ain't a trainman.

Q. You have been about trains a good deal?

A. Yes, sir.

Q. When they let them loose there is always more or less shock owing to the weight and distance they run, is there not?

74 Question objected to and objection sustained.

Q. You did not see Schumacher, did you, when he fell?

A. No, sir.

Q. You don't know whether he fell between the cars or of- on one side?

A. No, sir; I didn't see him fall.

W. M. GIFFORD, being called in behalf of the plaintiff and being duly sworn, testifies as follows:

(By Mr. GRACE:)

Q. Where do you live when you are at home?

A. Chester.

Q. What is your employment?

A. Working for the railroad company.

Q. Have you been sworn?

A. Yes, sir.

Q. What company, the Saint Louis and San Francisco?

A. Yes, sir.

Q. In what capacity?

A. Braking.

Q. How long have you been in the employ of the company?

A. Went to work the last time a year ago last 3rd July.

Q. Would be nearly two years?

A. Yes, sir.

Q. What work were you at mostly?

A. Previous to that?

Q. Yes, sir.

A. Railroading for nine years.

Q. Were you at Talihina the day Schumacher got hurt?

A. Yes, sir.

Q. Were you working on the same train?

75 A. Yes, sir.

Q. Were you braking on the same train?

A. Yes, sir.

Q. Where did you start from on the morning of the accident?

A. Tuscahoma.

Q. How many cars were there?

A. Nothing but the caboose until we got to the gravel pit, and got out four cars and came to Talihina with them.

Q. Who was your conductor?
A. John Burke.
Q. Who was the engineer?
A. Harry Young.
Q. How far is it from Tuscahoma to Talihina?
A. It is seventeen miles—a little over seventeen—seventeen and seven-tenths.
Q. What time a day did you get to Talihina?
A. 8.30, about.
Q. In the morning?
A. Yes, sir.
Q. State all you know in regard to the accident to Schumacher.
A. We had orders to get out ten cars more of gravel.
Q. From where?
A. On the west side of Talihina.
Q. Who were the orders from?
A. John Burke, the conductor. I went in on the siding with the engine and coupled on the cars and left the cars and the caboose on the main track. I had never been there before, and the grade was a little steeper than I thought it was, and the cars got the start of me a little, and when I saw that they were going to hit a little to- hard I hallo-ed to the men, "Look out!" The cars went down and struck and knocked Mr. Schumacher of- the car he was sitting on.
Q. You saw you were going to strike harder than you ought?
A. Yes, sir.
Q. Harder than usual?
76 A. Harder than cars ought to strike to be safe in making a coupling.
Q. Who made the coupling?
A. It was not made.
Q. Not at all?
A. Not at that time.
Q. Did you see Mr. Schumacher fall?
A. No, sir; I didn't see him when he fell.
Q. You hitched the engine on ten cars and pulled them out, did you?
A. Yes, sir.
Q. (Showing.) Suppose this is the main track. These ten cars were here, and the three in there you did not want to take. You go away up here so as to clear the switch?
A. Yes, sir.
Q. And cut the engine loose from these head cars that you were switching, and left these ten cars to go down the grade?
A. Yes, sir.
Q. You were on the ten cars?
A. Yes, sir.
Q. Where was the head man?
A. On the other car.
Q. That left one man with the engine and engineer. Where was the conductor?

A. Back here on the main track.
Q. Was he expecting to make that coupling?
A. That is the general rule.
Q. There was nobody else to do it?
A. Nobody but him.
Q. Do you know where he was on the cars?
A. He was on the ground on the east side of the track.
77 Q. Had he gone on the side track?
A. No; I don't think he went over.
Q. You had ten cars going down here and you were brakeman on that (showing)?
A. Yes, sir.
Q. I suppose you had only one brake. That is as many as you can set, one at a time, I mean?
A. One at a time.
Q. You say these cars were coming to- fast?
A. Yes, sir.
Q. Did you do all you could to stop them?
A. Yes, sir.
Q. What is the reason you could not stop them?
A. The grade was to- steep.
Q. What was the condition of the brakes?
A. All right, as far as I know. I didn't examine them before or after.
Q. Do each car have brakes on them?
A. Yes, sir.
Q. So they run down. If this other brakeman had been there wouldn't he have been of advantage to you?
A. I suppose he would.
Q. If there had been enough men you could have held her down so as not to hurt anybody?
A. Yes, sir.
Q. As a matter of fact there was not enough men to hold her down easy?
A. There was not.
Q. You did what you could?
A. Yes, sir.
Q. Do you know how these cars came on the side track?
A. Put there by the crew, I guess.
Q. Don't guess. Do you know?
A. No, sir.
78 Q. You didn't bring them up?
A. I had nothing to do with them until I coupled them on the side track.
Q. Did you come with that train to Tuscahoma?
A. Yes, sir.
Q. How far up?
A. About four miles.
Q. Is it a pretty steep grade up there?
A. Yes, sir.
Q. There is a little mountain, isn't there?

A. Yes, sir; Winding Stair mountain; it is up grade all the way, but it is not a very bad hill.

Q. How far is it to the tunnel?

A. There is none at all—that is, between here and Genson.

Q. Do you remember of anybody on your train, as you were going up the mountain, having to stop and scotch the wheels?

A. No, sir.

Q. Was there nothing disarranged?

A. We would run up a piece and run back a ways; no single set of brakes will stop a train.

Q. Did the brakes hold them?

A. After we got them set; they always do after we get them set.

Q. Always bound to stop a train?

A. When we get them set.

Q. How far is it from the place to where the accident occurred?

A. Three miles—about three miles to the foot of the steep place.

Q. How long had you been in the habit of running up there?

A. This was my first trip; it was the first work I had ever done at the switch.

79 Q. You had been at Tuscahoma?

A. Yes, sir; in the gravel pit.

Q. And had not been running up there?

A. No, sir.

Q. Have you been there a good deal since?

A. Yes, sir; a good deal since; most all of the time.

Cross-examination.

(By Mr. CLAYTON:)

Q. You was a brakeman and had been engaged for the company nine years?

A. Most of the time.

Q. Had you been with any other road?

A. Had been with the Saint Louis and San Francisco all the time.

Q. You had a good deal of experience as brakeman?

A. Yes, sir.

Q. Up to that time?

A. Yes, sir.

Q. As a brakeman did you do your duty on that occasion and were you guilty of any carelessness?

Question objected to and objection overruled.

Q. It was not brought to your knowledge that you were negligent of your duty?

A. I don't think I did.

Q. The track looked like it was level?

A. Yes, sir.

Q. You gave command to cut the cars loose above?

A. Yes, sir.

Q. There were three or four cars that you did not want?

A. Yes, sir.

80 Q. The engine came and hitched on and pulled all up on the main track, and in order to get the cars you cut off the cars you did not want and the engine held them. Is that right?

A. That is the right way.

Q. That is the wqy switching of that kind is uniformly done?

A. Yes, sir.

Q. You had been nine years railroading?

A. Yes, sir.

Q. And know how it ought to be done?

A. I think I do.

Q. Did you have a caboose on that occasion?

A. Yes, sir.

Q. What for?

A. For the crew and the men on the train to ride in.

Q. Is it a rule, do you know, for the *emn* to ride in the caboose?

A. They generally tried to keep them in the caboose.

Q. Do you know whether the men employed were generally informed of it?

A. I have heard of it.

Q. Do you know if this particular crew knew of *ti* it?

A. Yes, sir; they did.

Q. Who told them?

A. Mr. Burke.

Q. Did you hear him?

A. I heard him.

Q. What did he say?

A. The men had better ride in the caboose; there was lots of room in there.

Q. How often did he tell them?

A. I think twice.

Q. You say it is dangerous to ride on the cars; is it not even more dangerous to ride where the car couples?

A. It takes a very little lick to knock a man off unless he has got something to hold to; I won't ride there myself.

81 Q. I will ask you if it is not considered by all railroad men—it is careless and dangerous to ride there.

Question objected to.

The COURT: Let him state the facts and it will be left to the jury to decide whether the facts constitute carelessness.

By Mr. CLAYTON:

Q. It is a dangerous place to ride?

A. It is so considered by all railroad men.

Q. What time of the day did the conductor tell him to get off?

A. I think we left Tuscahoma about seven o'clock; a little before that, maybe; between that and when we arrived at Talihina, at 8.30.

Q. Do you know where the plaintiff was sitting?

A. On the head end of the second car above the caboose; on the corner of the end of the car.

Q. When you got on the train you commenced setting the brakes?

A. Yes, sir.

Q. The car struck harder than it ought to, you say?

A. I have seen it strike harder; it did not break the draw-head; it broke one end of the car a little.

Q. How close were you to these cars when you hallooed "look out"?

A. Seven or eight car-lengths.

Q. Did you halloo loud enough for them to hear you?

A. They said they did.

Question and answer objected to and objection sustained.

Q. Repeated.

A. I tried to; I could hear them halloo.

Q. They ought to have heard you?

A. I think they did.

Q. Who was the foreman of these men?

A. Pat. Kinney.

82 Q. Was he there?

A. Yes, sir.

Q. Did you hear him halloo?

A. I think I did. I didn't pay any attention to voices. I was setting the brakes. I heard somebody halloo back there.

Q. And then you hallooed to them to look out?

A. Yes, sir,

Q. How many brakemen do you usually have to a train?

A. Two.

Q. You had two that time?

A. Yes, sir.

Q. Was each doing his duty?

A. Yes, sir.

Q. How many engineers do you have?

A. One.

Q. Who was the engineer?

A. John Burke.

Q. Was he a capable and competent man?

A. Yes, sir.

Q. Who was the other brakeman?

A. Crocket.

Q. Was he capable and competent?

A. Yes, sir; he was a good brakeman.

Q. A good, careful man, capable of discharging his duty?

A. Yes, sir.

Q. This was on Sunday?

A. Yes, sir; on Sunday.

Q. Mr. Gifford, I will ask you if it was not one of the rules of the company that the men should not ride on those cars, but should ride in the caboose.

A. I don't think I ever saw any rules.
Q. I don't mean printed rules, but orders.
A. The conductor always told us to look out for the men and keep them in the middle of the cars, where they would not get hurt.
Q. Did you always do it?
A. Yes, sir.
83 Q. Did they know it?
A. They had been told often enough.

Question objected to.

Q. Did you ever tell these men?
A. I don't know that I did personally. He was on the end of the car when Burke told him.
Q. Did he get off the end of the car?
A. No, sir; I don't think he did.
Q. He remained there?
A. Yes, sir.

Redirect examination.

By Mr. GRACE:

Q. When was it Burke told them that?
A. While they were running between Tuscahoma and Talihina.

By Mr. CLAYTON:

Q. Is it not more dangerous at the time of a coupling coming on that at any other time to sit at those places?
A. Yes, sir.
Q. If a man is sitting up at one end of a car—on a car at the time the coupling is making—it takes a very little lick to knock him off, don't it?
A. No railroad man will ride there unless he has got something to hold to.

By Mr. GRACE:

Q. They didn't furnish gravelmen with brakes to hold to, did they?
A. No, sir. If they did remain they did it on their own peril.
Q. I understand that Mr. Burke told them to go into the caboose?
A. He told them they had better ride in the caboose. There was lots of room there.
Q. Where was that?
A. Between Tuscahoma and Talihina.
Q. Where was he?
A. On the cars, where the men were.
84 Q. On the other cars?
A. On the gravel cars.
Q. There were three or four of them?
A. Yes, sir.
Q. Where was he?

A. He walked over both cars.

Q. Wher- was he?

A. On the second car from the caboose. I saw him there, and he said they had better ride in the caboose.

Q. Did they go in?

A. Some of them went in.

Q. Do you remember how many were riding on the gravel cars?

A. Maybe 5 or 6 or 7 or 8.

Q. Al- of these men were under the direction of whom?

—. ——.

—. It was Burke that told them to*m* go in?

A. Yes, sir.

Q. He had charge of the train?

A. Yes, sir; he was the conductor.

Q. The men had been in the habit of riding that way all along, hadn't they?

A. Yes; some always rode out there.

Q. On nice days don't they generally ride out there?

A. Some days they do and some days they ride in the caboose.

Q. Did you say this switching was done the way it is always done?

A. Yes, sir.

Q. I understand it could not be done any other way?

A. I don't know any other way.

Q. What is to hinder cutting the engine loose and coming down with these cars?

A. It is the same thing, if the engine was there, as to cut from the cars.

85 Q. Couldn't it come down easy and not hurt anything?

A. It might.

Q. Wouldn't it be safer?

A. It might be safer, but it is not the general way.

Q. Do you know why*n* the conductor did not make the coupling?

A. He was there.

Q. Do y*l*ou think it would be safe for him to make the coupling as it came down in that way?

A. I don't know.

Q. You would rather that he would try it than to try it yourself?

A. If he had tried it, it would have been safe, because it did not break the draw-heads. The way the car broke, if a man had been in between them he would not have been hurt.

Q. If he knew just where to get. You say very often, in making switches, you cut the cars loose and let them run down; wouldn't it be more prudent to couple the cars with the engine attached?

A. He would never get anywhere at all.

Q. Oh, he would not make as much time as to let them rip. You think Schumacher was on the head end of the second car from the caboose?

A. I think so.

Q. Might he not have been on the first car from the north end?

A. I think the second car. I don't know for certain whether the first or second one.

Q. Were his feet on the outside?

A. On the outside.

Q. In between the cars?

A. On the outside.

Q. On the left or right side?

A. On the left.

86 Q. The west side going north?

A. Yes, sir.

Q. If a man is knocked off at all, that is the best attitude; he is more able to clear himself, ain't he? He is just in shape to jump?

A. If he is sitting on the cars a very little lick knocks him off and he falls off.

Q. Is it safer to fall of- the side than at the end?

A. Yes, sir.

Q. Much safer?

A. If his feet are at the side he has the best chance to be safe; the probability is he will fall outside of the rail.

Recross-examination.

By Mr. CLAYTON:

Q. Mr. Gifford, I will ask you if on that train, two or three days before that, you did not find the plaintiff riding on other dangerous places and have to take him off.

Question objected to.

Q. Did not the plaintiff come very near getting killed two or three days before that?

A. Yes, sir.

Question objected to and question allowed.

Q. What do you know about that case?

A. We had some em-ties to be coupled on and we had our engine, and the alarm was given to go to dinner, and he stepped between the engine and the cars and I pushed him out.

Q. What would have been the result if you had not pushed him out?

A. He might have lost a leg or two and might have been killed.

Q. How many days before was that?

A. I didn't remember; maybe 5 or 6, maybe 10 days; I don't think it was over 8 days at the outside.

87 Q. Wher- was the conductor when these two cars came together?

A. He was on the east side of the cars, if I remember right.

Q. Did you hear him say anything?

A. I just heard a voice halloo.

Q. More than one voice?

A. I couldn't tell.

By Mr. GRACE:

Q. 5 or 6 days before this plaintiff started to get on the cars and the train started up. Who started up the train?
A. Mr. Young, I think.
Q. Somebody started the train before the plaintiff could get on?
A. Yes, sir.
Q. And then he tried to get on?
A. Yes, sir; he stepped right ahead of the engine; ahead of the pilot; all he had to do was to step on the cow-catcher.
Q. Whose fault was it the train started up before he could get on?
A. I don't know.
Q. It wasn't his, was it?
A. No, sir.
Q. Why didn't you stop when you saw him coming?
A. Ther- was no time to stop; if he had stayed off we would have stopped.
Q. You didn't run from him?
A. No, sir.
Q. Did you push him hard?
A. I pushed him off. I was standing on the first car from the engine.
Q. How many men have you ever run over?
A. He is the first and only one ever got hurt around where I worked.

GERHARD SCHUMACHER recalled:

Q. I understood you to say something about being natu-
88 ralized. When was that?
A. When the mayor was elected.
Q. Before Judge Parker?
A. No judge in this court.
Q. When the new mayor was elected in this town?
A. Yes, sir.
Q. Up to that time you were a citizen of the Empire of Germany?
A. Yes, sir.

By Mr. CLAYTON:

Q. When did you get your papers?
A. I only got my first papers.
Q. When was that?
A. When the election was.
Q. A month or two ago?
A. Yes, sir.

This was all of the testimony offered by the plaintiff.

89 The defendant railway company, to maintain the issues on its part, introduced the following witnesses, who, being duly sworn, testified as follows:

T. F. RILEY, being called in behalf of the defendant and being duly sworn, testified as follows:

By Mr. CLAYTON:

Q. State your name.
A. Thomas F. Riley.
Q. Where do you live?
A. At Paris, Texas.
Q. What is your business?
A. Train master on the Saint Louis and San Francisco road.
Q. Do you know the plaintiff in this case?
A. Yes, sir.
Q. Were you present at the time he got hurt?
A. Yes, sir.
Q. Do you remember the time?
A. Sunday, 3rd of July.
Q. What year?
A. 1887.
Q. How long had you been assistant road master at that time?
A. Three days.
Q. How long have you been in the railroad business?
A. Since 1869.
Q. At what sort of work?
A. Track-work generally.
Q. How long have you been at your present business?
A. Since the 1st day of July, 1887.
90 Q. Are you familiar with the rules and regulations at that time in regard to men riding upon the flat cars in a train?
A. Yes, sir.
Q. What was the rule of the Saint Louis and San Francisco in regard to that?
A. The Saint Louis and San Fr-isco Railroad Company furnished cabooses for that purpose.
Q. Did they have a caboose that day?
A. Yes, sir.
Q. Did the rules require them to ride in the caboose, do you know?
A. Yes, sir.
Q. Were the men informed in regard to it?
A. Yes, sir; I called the attention of the conductor to it.
Q. Did he say anything to them?
A. Yes, sir; he went out and told them to get into the caboose.
Q. Why?
A. Because it is much safer.
Q. Is it not safe to ride on the cars?
A. Sometimes it is and sometimes it is not.
Q. Is it safe to ride on a gravel car?
A. In the center of the car it is safe.
Q. If the feet is hanging on the outside is it safe?
A. No, sir.

Q. In regard to sitting on the end of the car, is that more dangerous?

A. Yes, sir.

Q. Is it known by all railroad men?

A. Yes, sir; it is a dangerous place on the end of a car.

Q. Where was Schumacher sitting?

A. On the northwest corner of the car.

Q. Towards Fort Smith?

91 A. The way the train was going.

Q. Did you see him when he fell?

A. I saw him just as he fell off.

Q. Where did he fall?

A. Between the cars—that is, his body fell out and his feet kind of under.

Q. If he had been sitting further back could he have saved himself?

A. Yes, sir; because he would have had a handhold to keep from dropping between the cars.

Q. What time was it that the conductor told him to go inside?

A. Just after seven o'clock.

Q. Before the accident?

A. Yes, sir.

Q. Where was the plaintiff?

A. I couldn't say. He was with the men.

Q. You don't know whether at that particular place or not?

A. I don't know.

Q. If so, could he have heard what the conductor said?

A. Yes, sir.

Q. Had you left gravel off on your way down?

A. Yes, sir.

Q. Had you been informed that it was the rule of the company not to ride on the cars?

A. Yes, sir.

Q. From whom were you informed?

A. That is pretty hard to say. I always knew it.

Q. Had you been informed by Road Master McMullan?

A. Yes, sir.

92 Q. How is it that the *em*n go upon the cars and ride that way?

A. Many of them carry the idea that they are competent to take care of themselves; of course, we have not the power of officers to make t-em ride in the caboose; we can only warn them.

Q. Had you spoken to the man?

A. No; only to the conductor.

Q. Did any of them get in the caboose?

A. Some, I think.

Q. And others remained out there?

A. Yes, sir.

Q. In the place where the plaintiff was riding that day is it unusually dangerous at the time of coupling the cars?

A. Yes, sir.

Q. When the cars are being coupled?
A. It is unusually dangerous at any time.
Q. Were the men allowed to ride in that position on the cars at all?
A. Not if we can help it they are not.
Q. At the time of the accident did you hear anybody give warning?
A. Yes, the br*eak*man.
Q. What did he say?
A. "Look out."
Q. Did you hear Mr. Kinney?
A. Didn't pay much attention; I was watching the cars ahead.
Q. You heard the br*eak*man, Mr. Gifford, give the warning to look out?
A. Yes, sir.
Q. Was it pretty loud?
A. Yes, sir.
Q. Were were you?
A. On side track.
A. About a car and a half back from where Schumacher was.
93 Q. Did Gifford halloo loud enough for him to hear him?
A. It was loud enough for me, and I was farther than he was.
Q. Do you know the conductor?
A. Yes, sir.
Q. Mr. Burke?
A. Yes, sir.
Q. And you know Mr. Gifford?
A. Yes, sir.
Q. Were they both competent men—careful men?
A. Yes, sir; competent and careful men.
Q. What was done with Mr. Schumacher after he fell?
A. We picked him up and carried him over to a house on some boards and got a doctor, and stopped the blood and sent him to Fort Smith.
Q. On the passenger train?
A. Yes, sir.
Q. That was the first opportunity you had to send him?
A. Yes, sir.
Q. Did you send anybody with him?
A. Yes, sir; two men.
Q. Whom were they?
A. Schulenberg and John Goodwin.
Q. Did you send a man by the name of Smith?
A. I don't recollect only two. I got passes for Schulenberg and Goodwin. I think there was a man named Charley Smith in the crowd.
Q. Did he go to Fort Smith?
A. I think he did come with them; I am not positive; I think

his name was Charley Smith; I know I was to have passes for two men to come with him.

94 Q. To take care of him. Did you go?

A. Yes, sir.

Q. Do you know anything about how many brakemen were on the cars?

A. Two brakemen and a conductor.

Q. Is that the usual complement?

A. Yes, sir.

Q. This was a construction train, was it not?

A. Yes, sir.

Q. Did you observe the switching on that occasion?

A. Yes, sir; it was a straight switch and that was all there was of it.

Cross-examination.

By Mr. GRACE:

Q. You are assistant road master?

A. Yes, sir.

Q. Is that your position now?

A. Yes, sir.

Q. You were appointed the 1st of July?

A. Yes, sir.

Q. Before that what were you doing?

A. I had been foreman.

Q. Where had you been working?

A. On the St. Louis and San Francisco.

Q. Around Tuscahoma; around the gravel pits there?

A. Yes, sir.

Q. Were you foreman of the gang of men there?

A. Yes, sir.

Q. Along with Pat. Kinney?

A. Yes, sir.

Q. At the same gravel pit?

A. Yes, sir.

95 Q. When had you been up at Talihina before that?

A. I don't recollect; a few days before that, probably.

Q. How many men were working in all in the gravel pit before starting to Talihina?

A. Probably seventy or eighty men; sometimes a hundred.

Q. Where did they all board there?

A. They camped at the gravel pit and there is a section-house near there.

Q. Is there a station-house towards Tuscahoma?

A. There is a section-house and part of the men stayed there at night.

Q. Part of the men stayed there at night?

A. The sectionmen and sometimes the trainmen come down there and stayed.

Q. At evening, where did the men go?

A. At the gravel pit and the engine would go to the station.
Q. Where did you take this gravel, to various places on the road?
A. Yes, sir.
Q. The workmen had to ride and go on the train?
A. Certainly.
Q. You say you called the conductor's attention that some of the men on the flat cars had their feet hanging over?
A. Yes, sir.
Q. Were you yourself on the flat car?
A. I rode on the tail of the caboose.
Q. You said you were a car and a half back?
A. I was on the ground.
Q. Didn't you ride on the gravel cars that morning?
A. I couldn't say.
96 Q. You did sometimes?
A. Sometimes; yes.
Q. Was it not a very common thing—it was not unusual for the men to ride on the gravel cars?
A. It was not unusual.
Q. And, if I understand you, it was not against the orders if they did not get to near the end? Where were you when you called the conductor's attention?
A. At the caboose door.
Q. You think he spoke to some of them?
A. Yes, sir; he did.
Q. Did he speak to the plaintiff?
A. I couldn't say.
Q. He was aware that he was there?
A. I couldn't say, after he spoke to them.
Q. As a matter of fact, do you remember how many were on the gravel cars?
A. No, sir.
Q. Were you in the caboose?
A. I got off when we got to Talihina.
Q. You had been riding on the end of the caboose?
A. Yes, sir; on the hind end.
Q. Is it not rather dangerous to ride there?
A. If I fell I would fall in the car.
Q. There are a great many ways to get hurt about a car, isn't there?
A. A great many.
Q. You wouldn't say it was a dangerous place to sit on the cars in motion?
A. It ought not to be very dangerous when it is standing still and know it is going to stand still. It is always dangerous.
Q. Is there no safe place on the line?
A. Yes.
97 Q. Where?
A. On the side track.
Q. You had nothing to do with the running of the train yourself, did you?

A. No, sir.
Q. You say Burke and Gifford were the chief men?
A. As far as I know.
Q. You say it was Smith came up with Schumacher to Fort Smith?
A. I am not positive.
Q. Ther- was Smith, another man, and Goodwin?
A. I couldn't say.
Q. You know Goodwin was not in your employ?
A. I turned him off that morning.
Q. If I understand, there was a man by the name of Smith came up with him?
A I think so. I think there was a man by the name of Charley Smith there, but I don't know whether he came up or not.
Q. Do you know a man by the name of Burton?
A. I don't recollect him.
Q. Where is Burke now?
A. I understand he is working with the C., H. & D. road; yard master there, I think they say.
Q. Is it a promotion from conductor to yard master?
A. I think it would be a promotion to get to be a yard master like in the C., H. & D., in Cincinnati; much better than conductor of a construction train.
Q. He is not now working on your road, and is entirely impartial, is he?
A. Entirely impartial as far as I know.

Redirect examination.

98 By Mr. CLAYTON:

Q. Mr. Grace made you say it was safe to sit on a car when it was still. I want you to understand so as not to be caught in a trap. If a car stops on the main track is it not a dangerous place, an unusually dangerous place, to sit as the car is going to be coupled?
A. I do not understand.
Q. Repeated. How about a car coming down to get another car?
A. It would be a very dangerous place to sit.

By Mr. GRACE:

Q. Suppose he doesn't know they are going to couple?
A. He ought to know to be sitting on it.

(By Mr. C.:)

Q. When did you discharge Goodwin?
A. That morning.
Q. He is not working for the road now?
A. Not to my knowledge.
Q. What did you discharge him for?
A. Incompetency.
Q. Did it make John mad?
A. I dodn't suppose he felt very well over it.

Q. He is here now as a witness against the road, isn't he?
A. I couldn't say as to that.

By Mr. BYERS:

Q. You say Goodwin was discharged that morning?
A. Yes, sir.
Q. Has he been working for the road since?
A. I couldn't say.
Q. Mr. Clayton informed you that he was a witness against the road, did he not?
A. He asked me.
Q. You did not know that he was indicted for that crime?
A. I did not know that he was a witness.

99 By Mr. GRACE:

Q. Goodwin was there that morning?
A. He was on the train that morning.
Q. You said he was there after the accident?
A. It is quite probable he was there.

GEORGE MCMULLAN, being called for the defendant and being duly sworn, testified as follows:

By Mr. CLAYTON:

Q. You have stated your name was George McMullan?
A. Yes, sir.
Q. Where do you reside?
A. In Tuscahoma.
Q. In the Choctaw nation?
A. Yes, sir.
Q. What is your business?
A. I am road master.
Q. For the St. Louis and San Francisco Railroad Company?
A. Yes, sir.
Q. What part of the road did you have charge over?
A. Between Monet and Paris.
Q. Are you familiar with the rules and regulations of the company in regard to laborers and *and* surfaceing men passing to and fro?
A. Yes, sir.
Q. What is the rule in regard to where they shall ride?
A. Our instructions are to keep the men in the caboose for two reasons: They are out of the way of the trainmen, and it is a more safe place to ride.
Q. Is it more dangerous to ride on a flat loaded with gravel than on a caboose?
A. Yes, sir; and in considerable on account of the gravel flying in his eyes.
Q. You have heard the plaintiff state how he was riding?
100 A. Yes, sir.
Q. Is that a dangerous place?

A. It is to sit near the end of the car.

Q. In regard to coupling and switching? At that time was it a dangerous place?

A. Yes, sir; unless he is aware that the car is going to be coupled.

Q. More especially at the end?

A. Yes, sir.

Q. Is it not the duty of the employés to be on the watch?

A. It is their duty to be always on the guard.

Q. The more was the danger at that time?

A. Yes, sir; it is.

Q. Did you instruct the conductor or any person in regard to these rules?

A. I did.

Q. Do you know Mr. Burke?

A. Yes, sir.

Q. Have you always found him a competent and careful man?

A. Yes, sir.

Q. How about Mr. Young?

A. He was good.

Q. How about the brakeman?

A. Al- good as far as they go. The superintendent hires the trainmen and the master mechanic hires the engineer.

Q. You had car-inspectors to look after your brakes?

A. Yes, sir; had an overseer.

Q. And they were kept in good condition?

A. Yes, sir; it was their business.

101 Q. These cars they were switching, how came them to be left there?

A. We had a crew with the train the evening before and it got six o'clock before they got entirely loaded, and we left them there for the next day.

Q. You know that from being road master?

A. Yes, sir.

Q. These rules you speak of are not printed or public rules, are they?

A. No, sir; the conductor has entire charge of the train when they are out from the gravel pit, and the foreman when it goes into the pit.

Q. What is the customary crew?

A. The conductor, two brakemen, fireman, and engineer.

Q. Did this train have them?

A. Yes, sir.

Q. Is that considered sufficient?

A. Yes, sir; so considered all over the United States.

Q. Have you worked on other roads?

A. Yes, sir.

Q. What other roads have you worked on?

A. The Baltimore and Ohio, the New York, Chicago and St. Louis, and the Boston, Hoosack Tunnel and Western.

Q. From your knowledge of railroading that is the usual complement?

A. It is on all of the roads I have worked on, and I am acquainted with the system of other roads; it is the same on the Missouri Pacific; it is the same on any road I know of.

Q. You know of no defect in the machinery or the cars, do you?

A. None reported to me.

Q. If there was you would have known it, wouldn't you?

A. Yes, sir.

102 Q. You were not present at the time of the accident?

A. No, sir; I was at Tuscahoma gravel pit.

Cross-examination.

By Mr. GRACE:

Q. Who was the car-inspector you spoke of at that gravel pit?

A. A man by the name of Kinney.

Q. Is he here?

A. Yes, sir.

Q. You have been in the employ of the road ever since the 1st of July, 1887?

A. Yes, sir.

Q. At what?

A. Road master.

Q. Are there two car-inspectors, or only one?

A. Two.

Q. Who was the other?

A. I don't remember; I cannot call his name. Kinna had charge, unless the other fellow helped him.

Q. Were they car-inspectors or repairers?

A. They were inspectors as the car came into the pit, and if repairs were needed they do that.

Q. You say two brakemen were competent?

A. Yes, sir.

Q. Was there no limit to the number of cars they can handle?

A. Twenty cars are supposed to be a load

Q. When you were working on other roads you were working at repairing the tracks?

A. Yes, sir.

Q. You were not up to Talihina at the time of the accident?

A. No, sir.

Q. How far is Tuscahoma from Talihina?

A. Seventeen and a half miles.

The COURT: Are those cars provided with guards on each end?

A. I don't understand.

Q. Guards across the end?

A. No, sir.

By Mr. CLAYTON:

Q. What are guards?

103 A. I believe he has reference to racks. They are used when you are hauling ties or timber; they are not used on gravel cars.

Q. On gravel trains you cannot use them?
A. I never saw them put to the use of holding gravel on or for holding the men on.

By Mr. GRACE:

Q. How was this gravel loaded?
A. Just shoveled on.

By Mr. CLAYTON:

Q. You never saw them used on gravel trains?
A. No, sir.
Q. If they were on it would not be quite as dangerous for the men, would it?
A. I don't know. If the men were as close to the end as Schumacher, it would probally prevent them from falling between.
Q. If these racks were on the train a man could see them?
A. I think so.
Q. If they were not there it would make a man more careful, wouldn't it?
A. Yes, sir.
Q. Youn say they are not used in gravel trains?
A. No, sir.
Q. Being a gravel train, and, as they were not there, of course he could not see them?
A. There was no protection.
Q. What kind of a car are they used on? What do they look like?
A. Two upright stakes in a socket 2 x 4, and slats neqrly across, about 8 inches.
Q. Are they made to haul gravel?
A. Never seen them on gravel trains.
Q. Was this a gravel train?
A. Yes, sir.

104 H. L. YOUNG, being called in behalf of the defendant and being duly sworn, testified as follows:

By Mr. CLAYTON:

Q. What is your name?
A. H. L. Young.
Q. Where do you live?
A. In Paris, Texas.
Q. What is your business?
A. I am an engineer.
Q. Upon what road?
A. The St. Louis and San Francisco.
Q. How long have you been an engineer?
A. Since March, 1882.
Q. Have you been on the St. Louis and San Francisco road all the time?
A. No, sir.

Q. When did you go on the St. Louis and San Francisco road?
A. March 5th, 1887.
Q. Have you been running as an engineer since 1882?
A. Yes, sir.
Q. Were you engineer upon the "Frisco" train at the time Mr. Schumacher was hurt?
A. I was.
Q. Where did you start from that morning with your train?
A. From Tuscahoma.
Q. What were you engaged in?
A. I started with a train of cars loaded with gravel with the intention of unloading the gravel.
Q. Unloading at what place?
A. On the mountain.
Q. How far is the gravel off from Tuscahoma?
A. Two miles north; Tuscahoma is two miles south.
105 Q. You went to Tuscahoma to the gravel pit and got a train and *c* came this way?
A. Yes, sir; to Talihina.
Q. That was where the accident occurred, isn't it?
A. Yes, sir.
Q. When you got to Talihina did you stop there?
A. Yes, sir; we did.
Q. What for?
A. To get some gravel to take up the mountain.
Q. Was it already loaded?
A. Yes, sir.
Q. Where was it?
A. On the west side of the track.
Q. When you stopped there what did you do?
A. We went down the side track to couple on the train and Schumacher fell off, and when I got off my engine and the conductor and I came up at the same time and I said to him, How did it happen?
Q. Was Schumacher present at this time?
A. He was not further from me than that gentleman (showing).
Q. State what passed between you and Burke.

Question objected to.

By Mr. GRACE:

Q. State what you did after the accident; after *after* youn saw Schumacher fall; after the cars struck him, what did you do?
A. I went in the side track and left the caboose.
Q. What did you go in the side track for?
A. To leave the caboose; the reason was because the doors were locked and we couldn't get through; just the same as a man would lock his house up. We didn't unload our train; the crew was not on duty and we brought our engine back and coupled onto the train. Of course, if a man is hurt we would not go off and leave him like a dog.

106 Q. How long after was that?
A. It couldn't be more than two or three minutes; it couldn't be more than five minutes.
Q. After you went down on the side track?
A. We went in about the frog.
Q. Then came back and joined your train on and then got out and walked up where Schumacher was?
—. ——.
Q. How many cars were between you?
A. They *sar* fourteen; I couldn't say.
Q. You left the engine here and the tender?
A. The tender was back of us.

The COURT: I think if this conversation occurred in the presence of the plaintiff it can be admitted.

A. I came up and said, Where did this man come from; where was he? He said, On the end of the cars. I said, There is a caboose to ride on. He said, I did tell them to go in there two or three times, but I couldn't make them go in there.
Q. Was this in the presence of Schumacher?
A. No, sir.
Q. You heard that conversation, did you? The conductor had told them two or three times to go in the caboose?
A. Yes, sir.
Q. What did you take a caboose for?
A. We take it in order to have a good brake. A caboose has eight wheels and a car has but two, and we can get a caboose brake to hold better than two car wheels, it is claimed. That is it as much as anythin*d* else.
107 Q. Can you remember the time this occurred?
A. Between nine and ten o'clock. I can't say as to the minute.
Q. What did you do?
A. We took care of him as well as we could.

T. F. DOTSON, being called in behalf of the defendant and being duly sworn, testified as follows:

By Mr. CLAYTON:

Q. State your name.
A. T. F. Dotson.
Q. Where do you live?
A. Live at home—at Westport.
Q. What is your business?
A. Been railroading for a while.
Q. Were you railroading in 1887 when Schumacher was hurt?
A. Yes, sir.
Q. Were you on that train?
A. Yes, sir.
Q. In what capacity?
A. Carrying water.

Q. Carrying water for the men?
A. Yes, sir.
Q. What was the name of the conductor?
A. Burke.
Q. Mr. Dotson, did you see the plaintiff that day on the train?
A. Yes, sir.
Q. Where was he sitting?
A. On the gravel car.
Q. Which end, the north or the south?
A. The south, as well as I remember.
Q. I will ask you while there did you hear the conductor say anything about it being against the rules to ride on the train, before the plaintiff was hurt, in his presence?
A. I heard the conductor say that day to the men to ride in the caboose, that there was room in there for them, and that was
108 the place for them to ride.
Q. Where were you?
A. In the car next to the caboose.
Q. Where was the conductor?
A. On the car the plaintiff was on.
Q. You say he told them to get off and get into the caboose?
A. Yes, sir.
Q. Did Schumacher go when he told him?
A. No, sir.
Q. How often had you heard the conductor tell the men not to ride out there?
A. Several times that day.
Q. Is the caboose used for that purpose.
A. Yes, sir.
Q. How long before was the last time you heard him tell them to get off?
A. Not very long.
Q. Before or after they stopped at Talihina?
A. Before, as well as I remember.
Q. Did you see the plaintiff when he fell off?
A. Yes, sir.
Q. Where did he fall?
A. Between the cars.
Q. Between the cars, over the end?
A. Yes, sir.
Q. At the time of the coupling did you hear a man give an alarm?
A. Yes, sir.
109 Q. Who was it?
A. The foreman of the gang and brakeman.
Q. Where were you?
A. On the car next to the caboose.
Q. Where was Kinney?
A. In the caboose door.
Q. Where was the brakeman?
A. Riding the cars down.

Q. Did you hear them both?
A. Yes, sir.
Q. Were you further from the brakeman than Kinney?
A. Yes, sir.
Q. Were you standing or sitting?
A. Standing.
Q. Did the shock throw you down?
A. No, sir.
Q. Wasn't the shock hard enough?
A. No, sir.
Q. How far off was the car that was going down to your car to couple when Gifford hallooed out?
A. I don't know exactly how far. Mr. Kinney had time to step off the caboose.
Q. Do you remember which hallooed first?
A. They hallooed not far apart.
Q. Did they both give the alarm?
A. Yes, sir; they both hallooed.
Q. Please states whether or not you would consider the place where Schumacher was a dangerous or a safe place to sit.
A. I would not think it a safe place.
Q. Did you know at the time it was against the rules to ride there?
A. I did, sir.
Q. How long had they been switching there?
A. A little while.
Q. As quick as they could?
A. Yes, sir.

Cross-examination:

Q. How long have you been working on the road?
A. Off and on for two years; a little over.
Q. How long on and not off?
A. About five months.
Q. When was that?
A. In 1887.
Q. How long in 1888?
A. I disremember how much.
Q. Have you been working ever since?
A. Not ever since.
Q. Are you laying off now?
A. I am laying off now.
Q. How long have you been laying off?
A. Two weeks to-morrow.
Q. When are you going back?
A. I don't know.
Q. Where do you live?
A. At Westport, Washington county, Arkansas.
Q. When did you go to Westport?
A. Two weeks ago to-morrow.

Q. Where were you raised?
A. Mostly around Westport.
Q. Dotson is your name?
A. Yes, sir.
Q. Two weeks ago what were you doing?
A. Working at the section.
Q. What section?
A. Winslow; section 15.
111 Q. I will ask you whether or not you saw the accident happen.
A. Yes, sir.
Q. How long have you known Schumacher?
A. A little over a month.
Q. He had been at work there?
A. Yes, sir.
Q. Where were you riding the morning of the accident?
A. The day we were going north of Talihina to unload gravel.
Q. Where did you get on the cars?
A. At the gravel pit.
Q. What part of the train were you on?
A. I was first in the caboose.
Q. How long did you stay there?
A. Until we were nearly to Talihina, and then I got off and got onto a car.
Q. How were the cars loaded?
A. They just had gravel thrown on them.
Q. Was it heaped up or were there any side boards?
A. There were no side boards; it was heaped up some.
Q. A little higher in the middle than on the edges, wasn't it?
A. Yes, sir.
Q. How were you riding on your car?
A. I was about the center of the car.
Q. You got away up on the gravel heap, did you?
A. Yes, sir; I was standing there.
Q. Like patience on a monument. Did you call that a safe place?
A. I don't know. I got there because I wanted to ride there.
Q. You know a safe place when you see it?
A. I might.
Q. What car were you on?
112 A. I was on the first car from the caboose.
Q. About the center of the car, you said?
A. Yes, sir.
Q. Did you get off when you got to Talihina?
A. No, sir.
Q. You just remained there on the car?
A. Yes, sir; just remained there.
Q. Which way were your feet hanging?
A. I was not sitting down.
Q. Were you standing up?
A. Standing.

Q. Do you think it safer to stand than to sit?
A. I couldn't tell you. I don't know.
Q. When the conductor came where the men were and said to get in the caboose, how many men were on the cars?
A. Maybe 10 or 12. I don't know. I didn't count them.
Q. How many were in the caboose?
A. I couldn't say, not having counted them.
Q. You can't say?
A. No, sir.
Q. Did you come over in the caboose that morning?
A. Yes, sir.
Q. You hadn't gone back in the caboose when the accident happened?
A. No, sir.
Q. How came it that you didn't go when the conductor ordered the men to go in?
A. I didn't want to.
Q. What did you tell him, to go to hell?
A. No. I didn't want him to go.
Q. Anyhow, you didn't go?
A. No- at the present time.
Q. You did not care much for that conductor, did you?
113 A. I think he is a nice man.
Q. He is a good easy conductor, isn't he?
A. I don't know.
Q. Mr. Dotson, you say you saw the cars strike?
A. Yes, sir.
Q. Did you see the car when it run over his foot?
A. I couldn't see exactly from where I was standing.
Q. Did you hear them say, "Look out"?
A. I was looking out with all my eyes.
Q. You were trying to save yourself?
A. I was going to try.
Q. Are you right certain that you heard them halloo, "Look out"?
A. I am, sir.
Q. And then that is what you did—just stood there on top of the gravel? Was the jar hard enough to "faze" you?
A. It "sauter" jarred me, but not enough to knock me off.
Q. I suppose you put your best foot foremost?
A. I couldn't say.
Q. How old are you?
A. I am twenty years old.
Q. You have been off and on the road for four or five years? How long did you say?
A. A little over two years.
Q. You had no commands not to ride on the gravel?
A. I had been riding there.
Q. How many men worked there?
A. I couldn't say. Sometimes more than there were there then.
Q. Sometimes as many as 125?
A. I couldn't say. I was not keeping time.

Q. How many men did you water?
A. Sixteen, generally.
114 Q. Eighteen that morning?
A. Sixteen or eighteen.
Q. You have a general idea, of course, how many were there that morning and during the month?
A. I couldn't say.
Q. You know in this room there are more than eight; you ought to have an idea how many were there?
A. I suppose on the train there were 18 or 20 or 22.
Q. Don't you know ther- were more than 120?
A. There are more than 125 on the track.
Q. At the gravel pit are there not three or four gangs?
A. I couldn't say.
Q. Who was standing next to you on the car?
A. I don't know as anybody.
Q. Nobody?
A. Not that I remember of.
Q. You say it was before you got to Talihina that the conductor told you to g- in the caboose?
A. Yes, sir.
Q. The conductor had been through the train from you down to the engine; how many flat cars were there?
A. Down from the gravel pit that morning?
A. Yes.
A. Four cars.
Q. Do you know where the conductor was?
A. I reckon he was helping to switch, but I don't remember.

Redirect examination.

By Mr. CLAYTON:

Q. There were a good many working; they don't travel, only just enough to unload cars?
A. Yes, sir; that is all.

By Mr. GRACE:

Q. Does your father live at Westport?
A. My father is dead.
Q. Does your mother live there?
A. Yes, sir.
115 Q. How long have you been living at Westport?
A. Off and on, for nineteen years.
Q. More off than on?
A. I couldn't say.

By Mr. CLAYTON:

Q. You are not now in the employ of the company?
A. No, sir.

GEORGE MCMULLAN recalled.

By Mr. CLAYTON:

Q. I understood you to say that you sometimes had as many as a hundred men, and perhaps more, at these pits?

A. Yes, sir; there were men at the pit and some on the train and men to unload. The reason that we took these men was that them other gang had stopped work that day and would not be at work.

By Mr. GRACE:

Q. You had three or four different gangs at the pit, didn't you?

A. There was only one gang at the pit.

Q. There were three or four gangs of gravel-train men?

A. On the road, yes, sir; but not at the pit.

Q. I understood you to say there was a station-house where the men stayed at night?

A. Mr. Riley said that.

Q. Were there many about it?

A. Yes, sir.

Q. They didn't go back and forth?

A. No; they rema-ned there.

Q. How many remained at the pit?

A. From eighty to a hundred.

Q. Didn't they go on the track at all?

A. Sometimes.

116 Q. Sometimes?

A. Sometimes would take eight or ten.

Q. That would make thirty?

A. That depends. Sometimes if there was a small gang would usually take some.

Q. How many this time?

A. About eighteen.

Q. Did you go to Talihina this morning?

A. No, sir; I remained at the pit.

Q. How many brakes are there on each car?

A. One.

Q. Do you usually keep these brakes, for instance, on the north end, or do you turn one back and one forward so as to have them at the same end (showing)?

A. We don't turn the- any way. It is im-aterial which end they are on. I never saw a car rounded purposely, as I remember.

Q. If there is only one brakeman on a train and only one brake on a car he can only set one at a time, can he?

A. That is all.

Q. Construction trains have no regular time, do they?

A. No, sir.

Q. They run as they can?

A. Yes, sir; all by telegraph.

Q. They run as they can so as to keep out of the way?

A. And have orders to avoid other trains.

Q. Isn't it necessary sometimes to haul up a little?

A. They do that all the time. They are not allowed to run faster than eighteen miles an hour.

117 Q. In case they were getting in a hurry they would hurry up a little?

A. I have nothing to do with running the trains.

Q. Where do they get the telegrams?

A. Here at Fort Smith.

Q. You get orders before you start—between stations?

A. We had a telegraph office at the pit.

By Mr. CLAYTON:

Q. Wouldn't it be impracticable to keep freight cars turned one way al- the time?

A. It is impossible to do that.

Q. They take it as it goes?

A. Yes, sir; all roads do that.

Mr. CLAYTON: You have to have a turn-table every time; it would take a thousand turn-tables.

Mr. GRACE: It is admitted that at the age of thirty years the expectation of life is 35.33 years and at the age of 32 the expectation of life is 33.92 years.

Mr. CLAYTON: That is not rebuttal; I suppose you overlooked it the other day in your evidence-in-chief?

Mr. GRACE: That is really evidence-in-chief.

It is agreed that the case was never set for trial previous to the 28th day of May, 1889.

GERHARD SCHUMACHER recalled.

By Mr. GRACE:

Q. I think I understood you to say you were riding on the side of the car or on the end?

A. On the outside.

Q. Where did you fall? Between the cars or on the side?

A. I fell on the side of the car.

Q. After you were hurt; a few minutes after; I will ask you if you heard a conversation between the conductor and the engineer where you were lying?

118 A. No; I heard nothing at all.

By Mr. CLAYTON:

Q. If you fell on the side of the car, how did you happen to get your feet under? Wouldn't the jar naturally throw you this way (showing)?

A. I couldn't say. I was on the end of the car and fell that way (showing).

Q. How high is the car on which you were sitting?

A. There were no side boards——

Q. (Interrupting.) How high from the ground to where you were sitting? Was it higher than this table?

A. Yes, sir; a little.
Q. More than that. You were sitting on the side of one end and fell off there and got your feet under the wheels here (showing)?
A. Yes, sir.
Q. Didn't you state that you fell off the end of the cars?
A. No, sir.
Q. You didn't state it?
A. No.

JOHN GOODWIN recalled.

By Mr. GRACE:

Q. When you went up to where Schumacher was, immediately after he got hurt, did you hear any conversation between the conductor and the engineer in regard to trying to keep the man off of the train?
A. No.
Q. How long were you working on the gravel train?
A. I was not working on that train.
Q. You had been, hadn't you?
A. Before this.
Q. Is it customary on gravel trains to have guards to keep people from falling off?

119 Question objected to and objection overruled.

Q. Repeated.
A. I believe they run trains with side boards.
Q. Is there something to hold them up?
A. I guess there is a post in the car.

By Mr. CLAYTON:

Q. You say it is customary to have guards on gravel trains?
A. I didn't say anything about it. I don't know anything about it. I have seen boards on them.
Q. And have seen them without?
A. Have seen them.
Q. It didn't make any difference if they did have or didn't?
A. That is their own business, of course.
Q. You say you saw boards to gravel trains running here. When was that?
A. A couple days ago.
Q. Are these gravel trains on the Frisco road now?
A. A couple of days ago I saw some there.
Q. Were there boards on them?
A. Yes.
Q. How did you happen to notice the boards?
A. I happened to see them.
Q. You are not in the habit of seeing them, therefore noticed them that day?
A. Yes; not lately. I saw them as I passed. I don't know what made me notice them, but I seen them there.

Q. Do you know the difference between freight trains and construction trains?

A. I am no trainman.

Q. You don't know the difference between them?

A. I don't know nothing at all about it.

120 Q. You are not familiar with that part of the business?

A. No, sir.

121 This was all the testimony offered by the defendant.

At the conclusion of the taking of the testimony the plaintiff moved the court to charge and instruct the jury in writing as follows, to wit:

No. 1. It is the duty of a master to exercise ordinary and reasonable care not to expose his servant to unreasonable or extraordinary danger by putting him to work in dangerous places or with dangerous tools, machinery, or appliances. He is bound to furnish to the servant reasonably safe and suitable machinery, and if the master fails in this duty and the servant is injured without fault or negligence on his part contributing thereto, the master will be liable for such injury.

77 Am. Dec., p. 218, note, and numerous cases cited.

Hough *vs.* Railway Co., 100 U. S., 217.

No. 2. The master is bound not only to provide suitable machinery and appliances for his servant in the first instance, but also to use all reasonable care in keeping it safe and serviceable,

122 and with this object in view to make seasonable inspection of its condition, and if the master neglects or fails in this duty and an injury results to the servant thereby, without the contributory negligence of the servant, the master will be liable therefor.

77 Am. Dec., 220, note, & cases cited.

And it is not sufficient to exempt the master that it should appear that he had employed skillful mechanics with directions to inspect and repair and maintain machinery and appliances in good condition. The negligence of such agents is the negligence of the master; therefore if you believe from the evidence in this case that the agents or servants of the defendant failed or neglected to use proper care in providing, inspecting and repairing, and maintaining brakes or other proper appliances on the defendant's cars, and by such neglect the plaintiff was injured, you will find for the plaintiff.

36 Am. Dec., 289, notes.

Fuller *vs.* Jewett, 80 N. Y., 46 S. C.

36 Am. Rep., 575.

Flike *vs.* Boston & A. R. R., 53 N. Y., 549 S. C.

13 Am. R., 545.

McMahon *v.* Hemmingway, 3 Fed. Rep., 353.

123 No. 3. I charge you that an employé of a railroad is not bound by a rule of the company that is not brought to his attention or which is habitually disregarded with the knowledge of

his superior officers and without any effort on their part to *to* enforce it or when the usage and practice of the company tend to mislead him in the violation of the rule. (48 Ark., 334); 3 Wood, R'y L., p. 1488. If, therefore, you find from the evidence in this case that the plaintiff had been about a month in the employ of defendant as a laborer on a gravel train; that during that time he and his colaborers had been habitually riding on the gravel cars in going to and from the gravel pits and to and from the places on the road where the gravel was unloaded; that plaintiff's superior officers knew this and made no effort to prevent it and sometimes themselves rode there also, and that a large proportion of the laborers were so riding in the morning and just previous to the injury and at the time of the injury in view of the foreman and conductor, the pl. would not be in fault in riding on said car unless he put himself in a dangerous part of it when he need not have done so,

124 and if injured negligently by the company def't you should find for the *the* plaintiff.

No. 4. I charge you that the conductor of a train represents the railroad company in all matters connected with the running of the train and as to all persons under his command on said train, and therefore if you find from the evidence in this case that the conductor in charge of the train on which pl'f was sitting at the time of the injury complained of negligently ran his train or any part of it against that part or section of the train on which pl. was sitting and then threw him off and ran over him and injured him; that such negligence was the proximate cause of the injury, such negligence was not that of a fellow-servant, but was the negligence of the defendant company, & you should find for the plaintiff—Ross case, 112 U. S.—unless you should believe that had it not been for the negligence & want of care of plaintiff the injury would not have happened. If you believe this you would find for the defendant unless the injury of plaintiff was willfully and purposely caused by defendant.

No. 5. I charge you that if you should find from the evi-

125 dence that the plaintiff was guilty of negligence in riding near or on the end of the gravel car, and that that was a dangerous place to occupy, yet if you also find that the conductor knew that the plaintiff was there and after becoming aware of the negligence of the plaintiff he failed to exercise a proper degree of care to avoid injuring the plaintiff and by such negligence the plaintiff was injured, as charged in the complaint, such negligence of the def't would be the proximate cause of the injury, and in that case you should find for the plaintiff.

4 —, § 18.
Top note W., 25, 26, 27, 29, 30.
2 Wood's R'y, 1262, & note.
55 Am. Dec., 669.

But the conductor in this case did exercise a proper degree of care if he had requested the plaintiff or the laborers generally in the presence of the plaintiff to ride in the caboose or in a safer part

of the car than where the plaintiff was riding when thrown off and injured.

No. 6. The law requires a railroad company to exercise due and reasonable care to supply its trains with an adequate number of brakesmen and trainmen to properly handle and manage its cars while in motion so as not to endanger the life or limbs or
126 safety of its servants, and if you find from the evidence in this case that the defendant, by its conductor or other agents, detached defendant's cars from the engine and ran the said cars without a sufficient number of brakesman to control the speed of said cars while in motion, and that said cars ran with unusual force against the train on which plaintiff was sitting and knocked him off and ran a wheel over his foot and injured him, and that such failure to have a sufficient number of brakesman aboard said cars was the proximate cause of said injury you will find for plaintiff, unless you should believe that had it not been for the negligence or want of care of plaintiff the injury would not have happened.

No. 7. The court instructs the jury that in determining the question of negligence in this case they should take into consideration the situation and conduct of both parties at the time of the alleged injury as disclosed by the evidence, and if the jury believe from the evidence that the injury complained of was caused by the negligence of the defendant's servants, as charged in the declaration, and without any greater want of care or prudence on the
127 part of the plaintiff than was reasonable to expect from a person of ordinary care and prudence in the situation in which he found himself placed, then the plaintiff is entitled to recover.

No. 8. The burden of proving negligence rests on the party alleging it, and where a person charges it on the part of another he must prove the negligence by a preponderance of evidence; and in this case, unless the defendant has established contributory negligence by a preponderance of evidence, the jury should find the issue for the plaintiff.

No. 9. If the negligence of the defendant caused the injury of plaintiff without plaintiff's fault, the defendant will be liable in this action, though it should appear that one or more fellow-servants of the plaintiff were also guilty of negligence that contributed to the injury of plaintiff. 3 Fed. Rep., 353.

No. 10. If you find for the plaintiff, you will assess the amount of his damage at such a sum as will compensate him for the bodily injury he has sustained, the pain he has suffered, the effect of the injury on his health, according to its degree and probable duration, and the pecuniary loss sustained or that he will hereafter
128 sustain by reason of inability to attend to his business or to labor for a living.

To the giving of each and every of said several instructions the defendant at the time objected. The objection was overruled as to all of said several instructions excepting as to instructions num-

bered 1 and 2, which the court refused to give, but charged and instructed the jury pursuant to request of plaintiff as contained in his instructions numbered 3, 4, 5, 6, 7, 8, 9, and 10 over the objection of defendant, and to which the defendant at the time excepted and still excepts.

The defendant then moved the court to charge and instruct the jury in writing as follows:

#1. The jury are instructed that if they find from the evidence that plaintiff placed himself voluntarily upon the flat car, near its end, with his legs hanging down on the outside of the car, and that his position was more dangerous than in the caboose, and that he would not have been injured if he had been riding in the caboose, you will find for the defendant.

(34 Iowa, 285; 4 l. Ark., 542; 18 Fed. Rep't-, 229; 17 Fed. Rep't-, 882.)

#2. If the jury believe from the evidence that the defendant provided a caboose in which plaintiff could have ridden in
129 safety, then it was his duty to have done so; and if they further believe from the evidence that the plaintiff voluntarily placed himself on a flat car and was in that position when he was thrown from it and hurt, and would not have been injured had he been in the caboose, the court instructs you that it was contributory negligence on the part of plaintiff, and you will find for defendant, whether defendant was guilty of negligence or not.

(17 Fed. Rep't-, 882; 46 Wisc., 406; 21 Am. & Eng. R'y Cases, 248.)

#3. If the employee is guilty of any want of care whereby he unnecessarily exposed himself to danger and he is injured thereby, he cannot recover from the railway company. (No. 5, 4 l. Ark., 549.)

#4. The court instructs the jury that, the plaintiff being at the time he received his injury in the employ of the defendant, it is necessary for him to show affirmatively that at the time he received the injury his duty required him to be at the place where the injury occur-ed, and in this case if he has failed to do so you will find for defendant. (22 Am. & Eng. R'y Cases, 281, 14, all 429.)

#5. The jury are instructed that if they believe from the evidence that the plaintiff, being an employee of defendant, was sit-
130 ting on a flat car, near its end, with his feet hanging on the outside when said car with other cars were on the main track of the railway, and that the engine had been detached from said cars and was engaged in switching other loaded cars from a side track to be coupled to the cars on which plaintiff was sitting, then it was plaintiff's duty to be watchful and *and* on the lookout for the approaching cars and careful of his own safety when the coupling was to have been made; and, if you believe from the evidence that he was in the said position and that he neglected or failed to watch and be on the lookout and careful as aforesaid, you will find for the defendant. (9th U. S. 439; Book 24, p. 506; 5 Mallory, p. 549.)

#6. The jury are instructed that the burden of proof to show negligence on the part of the defendant is on the plaintiff, and he must prove it by a preponderance of evidence.

#7. The law presumes that the master has furnished sufficient crew for the proper management and handling of its trains; that the plaintiff, before he can recover for the failure of the master so to do, must prove by a preponderance of the evidence the respective acts and omission in which the master failed in this respect.

131 #8. If the jury find from the evidence that those in charge of train—the train hands—were careful and competent persons, and that by their negligence plaintiff was injured, that the said train hands in charge of train and the plaintiff are fellow-servants, for whose negligent conduct defendant is not responsible, and you will find for defendant.

#9. That it was negligence *per se* for *for* plaintiff to set on edge of flat car, his legs hanging down outside of car, when there was a caboose attached to train for him to ride in. The court refused to give instructions numbered 1, 2, 3, 4, 5, 6, 8, & 9, but gave instruction numbered 7; to the refusal to give which said instructions the defendant at the time objected; the objections were overruled, and the defendant excepted and still excepts; whereupon court modified instructions asked for by the defendant numbered 1, 2, 3, 4, 5, and 6 as follows and gave them as modified:

1st. The jury are instructed that if they find from the evidence that plaintiff placed himself voluntarily upon the flat car, near its end, with his legs hanging down on the outside of the car, and that his position was more dangerous than in the caboose, and that he would not have been injured if he had been riding in the caboose, you will find for the defendant, unless you believe that the default by its agents willfully and intentionally produced the injury of plaintiff.

132 2nd. If the jury believe from the evidence that the defendant provided a caboose in which plaintiff could have ridden in safety, then it was his duty to have done so; and if they further believe from the evidence that the plaintiff voluntarily placed himself on a flat car, and was in that position when he was thrown from it and hurt, and would not have been injured had he been in the caboose, the court instructs you that it was contributory negligence on the part of plaintiff, and you will find for defendant, whether defendant was guilty of negligence or not; unless such negligence was wilful and intentional for the purpose of injuring plaintiff, in such case you will find for plaintiff.

3rd. If the employee is guilty of any want of care, whereby he unnecessarily exposed himself to danger, and he is injured thereby, he cannot recover from the railway company unless such company, through or by its agents, wilfully and intentionally injured the plaintiff.

4th. The court instructs the jury that, the plaintiff being, at the time he received his injury, in the employ of the dendant, it is necessary for him to show affirmatively that at the time he

133 received the injury his duty required him to be at the place

where the injury occur-ed, and in this case if he has failed to do so you will find for the defendant, unless you find that the injury was willfully and intentionally inflicted.

5th. The jury are instructed that if they believe from the evidence that the plaintiff, being an employee of defendant, was sitting on a flat car, near its end, with his feet hanging on the outside, when said car, with other cars, *were* on the main track of the railway, and that the engine had been detached from said cars and was engaged in switching other loaded cars from a side track, to be coupled to the cars on which plaintiff was sitting, then it was plaintiff's duty to be watchful and on the lookout for the approaching cars and careful of his own safety when the coupling was to have been made, and if you believe from the evidence that he was in the said position, and that he neglected or failed to watch and be on the lookout and careful as aforesaid, you find for the defendant, unless you should believe that the defendant willfully and purposely injured plaintiff.

6th. The jury are instructed that the burden of proof to show negligence on the part of defendant is on the plaintiff, and he
134 must prove it by a preponderance of the evidence. To the giving of said several instructions in said modified manner the defendant at the time objected. The objection was overruled by the court, and the defendant at the time excepted and still excepts.

Afterwards, to wit, some two hours after the foregoing instructions had been given to the jury and after plaintiff's counsel had completed the opening argument and while the argument for the defendant was progressing before the jury, the court, of its own motion, over the objection of defendant, further charged and instructed the jury as follows:

Willfully or intentionally, as used in the instructions, means either a specific purpose to do the plaintiff an injury or a grossly reckless management of the car or cars after plaintiff's position on the car was discovered by defendant's agent, the conductor.

To make the management of the car a grossly reckless management the position of plaintiff on the car must have been known to the conductor sufficiently long before the injury to have enabled him and those under him in the management of the train to have prevented the injury. If such management was grossly
135 reckless, after plaintiff's position was discovered in time to have prevented the injury, such recklessness is equivalent to willful or intentional mischief.

The objection of the defendant to the giving of said instruction and also as to the time it was given by the court overruled, and the defendant at the time excepted and still excepts.

Afterwards, to wit, on the 3rd day of June, 1889, after the instructions of the court and argument of the counsel, the jury returned into court the following verdict:

We, the jury, find for the plaintiff and assess the damage at ($8,000.00) eight thousand dollars.

Thereupon the court rendered the following judgment, to wit: It is considered, ordered, and adjudged by the court that the said plaintiff, Gerhardt Schumacher, do have and recover of and from the said defendant, The Saint Louis and San Francisco Railway Company, the said sum of eight thousand dollars ($8,000.00), with interest on the same from this date until paid at the rate of six per cent. per annum, and all his costs in this cause laid out and expended, and that he have execution therefor.

Afterwards, to wit, on the 6th day of June, 1889, the defendant filed a motion to set aside said verdict and judgement
136 and for a new trial; which motion is in words and figures, to wit:

UNITED STATES OF AMERICA,
Western District of Arkansas.

In the Circuit Court of the United States for the Western District of Arkansas.

G. SCHUMACHER, Plaintiff,
vs.
SAINT LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Defendant.
} Motion for New Trial.

Now, on this day, comes the defendant in the above-entitled cause, The Saint Louis and San Francisco R'y Co., and moves the court to set aside the verdict herein and for a new trial—

1st. Because the verdict is contrary to law.

2nd. Because the verdict is contrary to the evidence.

3rd. Because the verdict is contrary to both the law and evidence.

4th. Because of error of law in refusing to give instructions No. 1, 2, 3, 4, 5, 6, 8 and 9, as asked by defendant.

5th. Because the court erred in modifying the instructions
137 of defendant, as asked for by defendant, numbered 1, 2, 3, 4, 5, and 6, and over the objections of defendant giving the same as so modified to the jury.

6th. Because the court erred in giving instructions numbered 3, 4, 5, 6, 7, 8, 9, 10, 11, as asked for by plaintiff over the objections of defendant.

7th. Because the verdict is not supported by the evidence.

8th. Because the court erred in admitting improper evidence over the objections of defendant, to which defendant at the time excepted, and which evidence will be fully set forth in bill of exceptions.

CLAYTON, BRIZZALARI & FORRESTER,
Attorneys for Defendant.

The court, on consideration whereof, overruled said motion on the 8th day of July, 1889. On this day, come on to be heard the motion heretofore filed by defendant to set aside the verdict of the jury and for a new trial in this cause, and the court, after being well and sufficiently advised in the premises, doth overrule said motion; to the

overruling of said motion the defendant at the time excepted and still excepts.

On this the 3rd day of August, 1889, comes the defendant and tenders to the court this its general bill of exceptions
138 containing all of defendant's exceptions taken during the progress of said cause to the actions and rulings of the court, the admission and exclusion of evidence, and the charge and instructions to the jury, said exceptions being all taken and saved at the trial and the time noted and the substance thereof reduced to writing; defendant therefore prays the court to sign and seal this bill of exceptions containing all of said exceptions, which is accordingly done, and the same ordered to be made a part of the record in this cause.

In testimony whereof I, I. C. Parker, judge of the United States district court for the western district of Arkansas, holding circuit court, do on this 3rd day of August, 1889, sign and seal this general bill of exceptions containing all of defendant's exceptions taken at and on the trial of this cause.

I. C. PARKER,
Judge of the United States Circuit Court for the Western District of Arkansas, Holding Circuit Court.

139 Know all men by these presents that we, Wm. H. H. Clayton, James Brizzolara, Jno. Vaile, and H. Baer, are held and firmly bound unto Gerhard Schumaker in the full
($10,000.) and just sum of ten thousand dollars, to be paid to the said Gerhard Schumaker, certain attorney, and executres, administrator, or assign; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seal and dated this 3 day of August, 1889.

Whereas lately, at a cession of the United States circuit court for the western district of Arkansas, in a suit depending in the said court between Gerhard Schumaker and the Saint Louis and San Francisco Railway Company, a final judgment was rendered against the said Saint Louis & San Francisco Railway Company, and the said Saint Louis & San Francisco Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the saint court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Gerhard Schumaker, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Saint Louis & San Francisco Railway Company shall prosecute said writ of error to effect and answer all damages and costs if the Saint Louis & San Francisco Railway Company fail to make

its plea good, *and* then the above obligation will be void; else to remain in full force and virtue.

WM. H. H. CLAYTON. [SEAL.]
JAMES BRIZZOLARA. [SEAL.]
JNO. VAILE. [SEAL.]
H. BAER. [SEAL.]

Sealed and delivered in presence of—
J. H. HANNERSLEY.
I. M. DODGER.

Approved by I. C. Parker, U. S. dist. judge.
STEPHEN WHEELER, *Clerk.*

Copy.

[Endorsed:] G. Schumaker *vs.* St. Louis & S. F. R'y Co. Bond. Filed Aug. 5, 1889. Stephen Wheeler, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Gerhard Schumacher, plaintiff, and The St. Louis and San Francisco R'y Co., d'f'ts, a manifest error hath happened, to the great damage of the said St. Louis and San Francisco R'y Co., as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 12 day of Sept'r, in the year of our Lord one thousand eight hundred and ninety.

[The Seal of the Circuit Court, U. S. A., Western District of Ark.]

STEPHEN WHEELER,
Clerk of the C't Court of the United States.

Allowed by—
I. C. PARKER,
U. — Dis: Judge, Holding Circuit Court.

142 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Gerhard Schumaker, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America for the western district of Arkansas, wherein The Saint Louis & San Francisco Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. C. Parker, judge of the district court of the United States, this 12th day of September, in the year of our Lord one thousand eight hundred and ninety.

I. C. PARKER,
U. S. Dist. Judge, Holding Circuit Court.

143 On this 13th day of September, in the year of our Lord one thousand eight hundred and ninety, personally appeared before me, the subscriber, James Brizzolara and makes oath that he delivered a true copy of the within citation to Geo. A. Grace, Esq., attorney of record of Gerhard Schumaker.

Sworn to and subscribed the 13th day of Sept., 1890.

—— ——.

Service of the within citation acknowledged Sept. 13, 1890.

GERHARDT SCHUMAKER,
By GEO. A. GRACE, *His Att'y.*

144 UNITED STATES OF AMERICA, }
Western District of Arkansas. }

I, Stephen Wheeler, clerk of the circuit court of the United States in and for the western district of Arkansas, hereby certify that the foregoing is true and correct transcript of the record and testimony taken in the case of Gerhardt Schumacher *vs.* St. Louis & San Francisco R'y Company, and that writ of error, copy of appeal bond, and citation are hereto attached.

The Seal of the Circuit Court, U. S. A., Western District of Ark.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Ft. Smith, in said district, this 12th day of September, A. D. 1890.

STEPHEN WHEELER, *Clerk.*

Endorsed on cover: Case No. 14,251. W. Arkansas C. C. U. S. No. 239. The St. Louis & San Francisco Railway Company, plaintiff in error, *vs.* Gerhard Schumacher. Filed October 13, 1890.

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JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
Plaintiff in Error,

vs.

GERHARD SCHUMACHER,
Defendant in Error.

No. 239.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Statement and Brief for Plaintiff in Error.

GEORGE R. PECK AND
EDWARD D. KENNA, WITH
BRITTON ~~GREAY~~,
A. T.
A. B. Browne
Attorneys for Plaintiff in Error.

CONTINENTAL PRINT, 515 N. THIRD

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Defendant in Error.

No. 239.

STATEMENT.

This is an action for personal injuries received by plaintiff, while in the employ of defendant as a laborer on a "gravel train" which was engaged in "surfacing" or ballasting defendant's track in the Indian Territory.

The acts of negligence alleged as grounds of recovery are:

First—That a certain brake, and other appliances and machinery, on one of the defendant's cars were defective;

Second—That defendant so negligently and improperly managed a certain train of cars that plaintiff was knocked off said train and run over;

Third—That defendant failed to make and enforce suitable regulations as to the manner of switching and making up trains, and regulating the speed thereof, and,

Fourth—That defendant failed to provide a sufficient number of brakemen to check and control its cars while switching, whereby plaintiff was run over and injured.

The answer puts in issue all these allegations, and pleads contributory negligence on the part of the plaintiff.

The evidence showed that plaintiff was engaged as a laborer for defendant, and that it was his duty to assist in loading the cars with gravel, and then ride down on the train to that portion of the track where the gravel was to be placed, and there assist in unloading and placing the gravel between the ties.

On the occasion of his injury plaintiff was riding on the end of a loaded flat car with his feet hanging over the side of the car. The train stopped at Talihina, a station between the gravel-pit and its destination, to pick up ten additional car loads of gravel; the original train upon which the plaintiff was, having consisted of four cars of gravel and a caboose.

The cause of the accident, according to plaintiff's theory, was that when the ten cars were coupled to the remainder of the train, the same ran back at too great a rate of speed, causing a violent jar or shock when they came in contact with that portion of the train on

which plaintiff sat, and that this jar or shock caused plaintiff to lose his balance and fall with his feet upon the rail, when the wheels passed over the toes of his right foot, necessitating amputation. The facts are thus stated by Wm. Gifford, a witness for plaintiff, and who was a brakeman on the train:

"We had orders to get out ten more cars of gravel at Talihina. I went in on the siding and coupled on the cars and left the cars and the caboose on the main track. There were three cars next to the engine that we did not want. When the engine and thirteen cars got on the main track I cut the ten we wanted loose from the engine and let them to go down the grade. I got on the cars and let them down the grade. I had never been there before and the grade was a little steeper than I thought it was, and the cars got the start of me a little and when I saw that they were going to hit a little too hard I hallooed to the men, "look out"; I saw that they were going to hit harder than I thought, harder than cars ought to strike in making a coupling. The brakes were all right so far as I know. If the other brakeman had been there he would have been of advantage to me. If there had been men enough, I could have held her down so as not to hurt anybody."

The evidence showed that the train was manned by the usual complement of trainmen, viz.: a conductor, two brakemen, an engineer and a fireman, and that each was competent. (See pp. 49 and 61 of printed transcript.)

At the time of the injury the conductor was near the north end of the four stationary cars for the purpose

of making the coupling and the engineer and fireman were in their proper positions upon the engine; one brakeman was with the engine and three cars which were being replaced on the side track, and the other (Wm. Gifford) was on the ten cars which were to be attached to the train.

There was no evidence of any defect in the brakes, machinery or appliances, or of any failure to make or enforce suitable regulations, and these issues were not submitted to the jury.

There was evidence tending to show that the place where defendant sat when he fell was a very dangerous place to be when cars were being coupled, and plaintiff testified that he knew that they were about to couple some cars on but was not watching and did not see the other cars come down. (See pp. 18 and 19 of printed record.)

There was evidence tending to show that both the brakeman and the foreman hallooed to the men on the flat cars to "look out," and that they were distinctly heard by persons in a less favorable position to hear than plaintiff. (See pp. 45, 49, 34, 56 and 67 of printed record.)

There was also evidence tending to show that the men had been warned by their foreman and by the trainmaster not to ride on the flat cars but to ride in the caboose, and there was evidence tending to show that the conductor had told this same gang of laborers the same morning that they had better ride in the caboose; that there was plenty of room there. (See pp. 49, 50, 51 and 66 of printed record.)

There was also testimony tending to show that many of the men often rode on the flat cars with the

knowledge of the foreman and the conductor.

There was absolutely no evidence showing or tending to show the omission on the part of the trainmen to do any act which would have tended to prevent the injury, after the discovery of any danger to plaintiff.

By the charge of the court the jury was instructed that the plaintiff might recover on any one of three separate grounds:

First—Because of the negligent running of the train by the conductor;

Second—By reason of a failure to supply the train with an adequate number of brakemen and trainmen; or,

Third—By reason of the willful and intentional injury to plaintiff by defendant's agents.

There was a verdict for plaintiff for $8,000.

The defendant contends:

First—That there was no evidence of negligence on the part of the conductor; and there was a total failure of proof that the train was not supplied with the usual and ordinary number of brakemen and trainmen, but on the contrary, the uncontradicted evidence showed that it was so supplied;

Second—That the trainmen were fellow-servants of plaintiff, and that he could not recover for their negligence, if proven;

Third—That there was absolutely no averment in the petition, and no evidence in the case that plaintiff was willfully or intentionally injured by defendant's employes, and no such issue should have been submitted to the jury; and

Fourth—That the plaintiff, from all the testimony in the case, was guilty of such contributory negligence as to bar a recovery, as a matter of law.

SPECIFICATION OF ERRORS.

(1.)

The court erred in giving in its charge to the jury instruction numbered 4, which is as follows:

4. "I charge you that the conductor of the train represents the railroad company in all matters connected with the running of the train and as to all persons under his command on said train, and therefore, if you find from the evidence in the case that the conductor in charge of the train on which plaintiff was sitting at the time of the injury complained of, negligently ran his train or any part thereof against that part or section of which plaintiff was sitting and then threw him off and ran over and injured him; that such negligence was the proximate cause of such injury; such negligence was not that of a fellow-servant, but was the negligence of the defendant company, and you will find for the plaintiff—Ross case, 112 U. S.—unless you should believe from the evidence that had it not been for the negligence and want of care of the plaintiff the injury would not have happened. If you believe this, you will find for the defendant, unless the injury of plaintiff was willfully and purposely caused by defendant." (See page 75 of printed transcript.)

(2.)

The court erred in giving in its charge to the jury instruction numbered 5, which is as follows:

5. "I charge you that if you should find from the evidence that the plaintiff was guilty of negligence in riding on or near the end of the gravel car, and that that was a dangerous place to occupy, yet, if you also find that the conductor knew that plaintiff was there, and after becoming aware of the negligence of the plaintiff, he failed to exercise a proper degree of care to avoid injuring plaintiff, and by such negligence plaintiff was injured as charged in the complaint, such negligence of the defendant would be the proximate cause of the injury, and in that case you should find for the plaintiff. But the conductor in this case did exercise a proper degree of care if he had requested the plaintiff, or the laborers generally, in the presence of the plaintiff, to ride in the caboose or a safer part of the car than that where the plaintiff was injured when thrown off and injured." (See page 75 of printed transcript.)

(3.)

The court erred in giving in its chargeto the jury instruction numbered 6, which is as follows:

6. "The law requires a railroad company to exercise due and reasonable care, to supply its trains with an adequate number of brakesmen and trainmen to properly manage and handle its cars while in motion so as not to endanger the lives or limbs or safety of its servants, and if you find from the evidence in this case that the defendant, by its conductor or other agents, detached defendant's cars from the engine and ran said cars without a sufficient number of brakesmen to control the speed of said car while in motion, and the said

cars ran with unusual force against the train on which plaintiff was sitting and knocked off and ran a wheel over his foot and injured him, and that such failure to have a sufficient number of brakesmen aboard was the proximate cause of said injury, you will find for the plaintiff, unless you should believe that had it not been for the negligence or want of care of the plaintiff the injury would not have happened." (See page 76 of printed transcript.)

(4.)

The court erred in giving to the jury in its charge instruction numbered 7, which is as follows:

7. "The court instructs the jury that in determining the question of negligence in this case they should take into consideration the situation and conduct of both parties at the time of the alleged injury, as disclosed by the evidence, and if the jury believe from the evidence that the injury complained of was caused by the negligence of defendant's servants, as charged in the declaration, and without any greater want of care or prudence on the part of the plaintiff than was reasonable to expect from a person of ordinary care and prudence in the situation in which he found himself placed, then plaintiff is entitled to recover." (See page 76 of printed transcript.)

(5.)

The court erred in giving in its charge to the jury, instruction numbered 8, which is as follows:

8. "The burden of proving negligence rests on the party alleging it, and where a person charges it on the part of another, he must prove the negligence by a

preponderance of the evidence; and in this case unless the defendant has established contributory negligence by a preponderance of the evidence, the jury should find the issue for the plaintiff." (See page 76 of printed transcript.)

(6.)

The court erred in adding to the instructions numbered 1, 2, 3, 4, 5 and 6, asked by the defendant, the following modification, viz.: "*Unless you believe that the defendant by its agent willfully and intentionally produced the injury to plaintiff.*" (See page 78 of printed transcript.)

(7.)

The court erred in refusing to give to the jury in its charge the instruction numbered 5, asked by defendant, which is as follows:

5. "The jury are instructed that if they believe from the evidence that the plaintiff, being an employee of the defendant, was sitting on a flat car near its end, with his feet hanging on the outside when the car with other cars were on the main track of the railway, and that the engine had been detached from said cars and was engaged in switching other loaded cars from a side track to be coupled to the cars on which plaintiff was sitting, then it was plaintiff's duty to be watchful, and on the lookout for the approaching cars, and careful of his safety when the coupling was to have been made; and, if you believe from the evidence that he was in the said position and that he neglected or failed to watch and be on the lookout and careful as aforesaid, you will find for the defendant." (See page 77 of printed transcript.)

(8.)

The court erred in refusing to charge the jury as requested in the instruction asked by defendant numbered 8, which is as follows:

8. "If the jury find from the evidence that those in charge of the train — the train hands — were careful and competent persons and that by their negligence plaintiff was injured, that the said train hands in charge of the train and the plaintiff are fellow-servants, from whose negligent conduct defendant is not responsible, and you will find for the defendant." (See page 78 of printed transcript.)

(9.)

The court erred in giving of its own motion the following instruction:

14. "Willfully and intentionally as used in the instructions means either a specific purpose to do the plaintiff an injury, or a grossly reckless management of the car or cars after plaintiff's position on the car was discovered by defendant's agent, the conductor.

"To make the management of the car a grossly reckless management, the position of the plaintiff on the car must have been known to the conductor sufficiently long before the injury to him and those under him in the management of the train to have prevented the injury. If such management was grossly reckless after plaintiff's position on the car was discovered in time to have prevented the injury such recklessness is equivalent to willful or intentional mischief." (See page 79 of printed transcript.)

POINTS AND AUTHORITIES.

I.

It is error for the court to give an instruction or charge to the jury which is not applicable to or supported by the evidence, however correct it may be, as an abstract principle of law.

Berrigan *v.* N. Y., L. E. & W. R. R. Co., 30 N. E. Rep. 57;
U. S. *v.* Breiting, 20 How. 252;
Goodman *v.* Simonds, 20 How. 343;
Chirae *et al. v.* Reinicke, 2 Peters, 613;
Ins. Co. *v.* Baring *et al.*, 20 Wall. 159;
C., R. I. & P. R. R. Co. *v.* Houston, 5 Otto, 697;
Jones *et al. v.* Randolph, 14 Otto, 108;
Denman *v.* Johnson, 48 N. W. Rep. 565;
Akridge *v.* A. & W. P. R. R. Co., 16 S. E. Rep. 81;
Phila. &c. R. R. Co. *v.* Rice, 26 A. & E. R. R. Cas. 264;
Stoher *v.* St. L., I. M. & S. R. R. Co., 4 S. W. Rep. 393.

II.

A laborer employed by a railroad company to load gravel at one place, and unload it at another and to ride to and fro between these places in the perform-

ance of his said work is, while so riding, a fellow-servant with the trainmen operating that particular train, and cannot recover of the common master for their negligence.

B. & O. R. R. Co. *v.* Baugh, 13 Supt. Ct. Rep. 914 (decided May, 1893);

Quebec Steamboat Co. *v.* Merchant, 133 U. S. 375 (1890);

N. Y. & N. E. R. R. *v.* Hyde, 56 Fed. Rep. 188 (1893);

Van Wickle *v.* Manhattan Ry. Co. 32 Fed. Rep. 278 (1886);

Evansville and Richmond Ry. Co. *v.* Henderson, 32 N. E. Rep. 1021 (1893);

L. S. & M. S. Ry. Co. *v.* Stupak, 23 N. E. Rep. 246 (1890);

Kuahbla *v.* O. S. L. & U. N. Ry. Co., 27 Pac. Rep. 91 (1891);

Corona *v.* G., H. & S. A. Ry. Co., 17 S. W. Rep. 384 (1891);

Ry. Co. *v.* Arispe, 17 S. W. Rep. 49;

Parker *v.* H. & St. Joe R. R. Co., 19 S. W. Rep. 1119 (1892);

Prather *v.* R. & D. R. R., 9 S. E. Rep. 530 (1888);

Howland *v.* M. L. O. & W. Ry. Co., 11 N. W. Rep. 529 (1882);

St. L., I. M. & S. R. R. Co. *v.* Shackleford, 42 Ark. 417 (1883);

Elliott *v.* C. M. & St. P. Ry. Co., 41 N. W. Rep. 758 (1889);

Fagundes *v.* Cent. R. R. Co., 21 Pac. Rep. 437 (Cal. 1889);
Cassidy *v.* Me. Cent. R. R. Co., 76 Me. 488 (Maine);
Abend *v.* T. H. & I., 111 Ills. 202 (1884).
Railroad Co. *v.* Tindell, 13 Ind. 366;
Gillshannon *v.* R. R. Co., 10 Cush. (Mass.) 228;
Evansville & C. R. R. Co. *v.* Henderson, 33 N. E. Rep. 1021 (Ind. 1893);
Railroad Co. *v.* Keefe, 47 Ill. 108;
Railway Co. *v.* Britz, 72 Ill. 256;
Int. & G. N. R. R. Co. *v.* Ryan, 18 S. W. Rep. 219, Sup. Court of Texas (1891);
Parrish *v.* P. & A. R. R. Co., 9 Sou. Rep. 696, Sup. Court of Florida (1891);
Higgins *v.* Mo. P. Ry. Co., 104 Mo. 413, Sup. Court of Mo. (1891);
Kumler, Adm'r, *v.* The Junction R. R. Co., 33 Ohio St. 150, Sup. Court of Ohio (1877);
Ryan *v.* Cumb. *et al.* R. R. Co., 23 Pa. St. 384, Sup. Court of Penn. (1854);
Heine *v.* C. & N. W. Ry. Co., 58 Wis. 525, Sup. Court of Wis. (1883);
Russell *v.* Hudson River R. R. Co., 17 N. Y. 134, Court of App. of N. Y. (1858);
T. W. & W. Ry. Co. *v.* Durkin, 76 Ill. 395, (1875);
Seaver *v.* B. & M. R. R. Co., 14 Gray, 466, Sup. Court of Mass. (1860);
Tunney *v.* Mid. R. R. Co., 1 C. P. L. R. 291;
Berrigan *v.* N. Y., L. E. & W. R. R. Co., 30 N. E. 57.

III.

When an employe needlessly places himself in a place of danger and by reason of so placing himself is injured, he is guilty of contributory negligence and cannot recover from the master therefor; and if an employe fails to use his eyes and ears when he knows, or has reason to anticipate action on the part of others which may make his situation a dangerous one, and is injured by reason of such anticipated act being negligently performed, thus unexpectedly increasing his danger, and he could have discovered such increased danger by reasonable use of his said senses, in time to have saved himself from injury, he cannot recover from the master therefor.

Abend *v.* T. H. & I., 111 Ill. 202 (1884);
Balt. & P. R. R. Co. *v.* Jones, 95 U. S. 439;
St. L. & S. F. Ry. Co. *v.* Warker, 41 Ark. 542;
Graves *v.* Scatter, 46 N. W. Rep. 936;
Kresanowski *v.* N. P. R. R. Co., 17 Fed. Rep. 229;
Martinson *v.* C., R. I. & P. R. R. Co., 11 A. & E. R. R. Cas. 233;
Lehigh Valley R. R. Co. *v.* Greiner, 28 A. & E. R. R. Cas. 397;
Warden *v.* L. & N. R. R. Co. 53 A. & E. R. R. Cas. 470;
Griggs *v.* Co., 104 U. S. 553.

ARGUMENT.

I.

By the fourth paragraph of the charge (see page 75 of printed record) the attention of the jury is called to some supposed negligence on the part of the conductor. Now but five acts of the conductor are contained in the record, viz., that he generally "rode on some cars in front" (see page 16 of printed record), that he "determined where they (the men) had to ride;" that he told this gang of men that they "had better ride in the caboose; there was lots of room in there" (see page 48 of printed record), and "he (the conductor) went out and told them (the men) to get in the caboose," and immediately after the injury he said, "I did tell them to go in there (the caboose) two or three times but couldn't make them" (pages 65 and 66 of printed record); and he ordered the crew to "take out ten cars of gravel" from the side track at Talihina (see page 45 of printed record); and at the time of the accident he was at the north end of the four stationary cars ready to make the coupling as was customary under such circumstances (see pages 42, 46 and 52 of printed record).

This being all the evidence as to the acts or duties of the conductor, it was the merest abstraction to tell the jury that the negligence of the conductor was that of the company, and not that of a fellow-servant.

This instruction was doubtless given under authority

of the Ross case, but however correct that decision may be in principle, it is not applicable to all cases, and it has been repeatedly held error to give an instruction even correct in principle, which is not hypothecated upon the evidence in the particular case on trial, thus:

In the U. S. *v.* Breiting, 20 How. 252, Chief Justice Taney said: "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court, and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions. but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures instead of weighing the testimony."

And Mr. Justice Clifford in the case of Goodman *v.* Simonds, 20 How. 343, holds that "when a prayer for instruction is presented to the court and there is no evidence in the case for the consideration of the jury, it ought always to be withheld; and as a general rule if it is given under such circumstances it will be an error in the court, for the reason that its tendency may be, and often is, to mislead the jury by withdrawin attention from the legitimate points of inquiry involved in the issue."

And in the case of Anthony Tourin Chirae *et al. v.* Reinicke, 2 Peters, 613, Justice Story, in passing upon a certain instruction, said: "Now there was not the slightest evidence from which the jury had a right to believe the existence of any such sister or sisters

and without such evidence the court ought not to have given the instruction, since it was calculated to mislead them and raise a mere speculative question."

In Beaver *v.* Taylor *et al.*, 1 Wall, 637, Mr. Justice Swayne announced that: "the law as to instruction outside of the facts of the case or involving abstract propositions is well settled. If they may have misled the jury to the injury of the party against whom their verdict is given, the error is fatal."

And in Bank *v.* Eldred, 9 Wall. 544, Mr. Justice Clifford quotes with approval the citation already given from U. S. *v.* Breiting, 20 How. 252.

And in the opinion in Insurance Company *v.* Baring *et al.*, 20 Wall. 159, Mr. Justice Clifford said: "that the court is never required by law to give an instruction to the jury which is not applicable to the case, even though it be correct as an abstract principle of law or rule of law, and it may be added that no prayer for instruction whether presented by the plaintiff or defendant can be regarded as applicable to the case when it is wholly unsupported by the evidence introduced to the jury."

In C. R. I. & P. R. R. Co. *v.* Houston, 5 Otto, 697, Mr. Justice Field said that "to instruct a jury upon assumed facts to which no evidence applied was error. Such instructions tended to mislead them by withdrawing their attention from the proper points involved in the issue. *Juries are sufficiently prone to indulge in conjectures without having possible facts not in evidence suggested for their consideration.*"

In Jones *et al. v.* Randolph, 14 Otto, 108, Mr. Ch. J. Waite held that a charge was misleading which assumed

that the jury might find that full payment of a debt had been made when there was no evidence whatsoever to support such a verdict, and the judgment was reversed for that reason alone.

The last clause of this (the fourth) instruction which presents to the jury for their consideration the issue as to whether plaintiff's injury was "willfully and purposely caused by the defendant," as well as a like modification of defendant's requests, numbered 1, 2, 3, 4, 5 and 6, comes clearly within the principle of these authorities, and the submission of that question to the jury was error, not only because there was no evidence on which to base such a submission, but for the further reason that it was entirely outside of the pleadings. We understand it to be the invariable rule that where damages are asked for "willful and intentional injuries to another" the declaration must aver such willfulness or intentional wrong, or facts, as will be equivalent to such averment.

The petition in this case has no averment which would advise defendant, even in the most distant manner, that plaintiff intended to predicate a recovery upon willful or intentional wrong, and the submission of that issue to the jury was error, as was held in the following cases:

In Denman *v.* Johnson, 48 N. W. Rep. 565, the declaration alleged that while plaintiff was traveling along the highway in a lawful manner defendant "carelessly, wrongfully and unlawfully drove his team against him at a furious pace," but did not allege the reckless, wanton, willful driving necessary to constitute gross negli-

gence. The court held that an instruction that defendanf was chargeable with reckless injury if he saw that collision was imminent, or had reason to believe that plaintiff was unaware of his approach and could have prevented the injury with ordinary care, even though plaintiff himself was negligent, was erroneous as imputing gross negligence and therefore outside the issue. And an instruction to the effect that if plaintiff in entering the highway neglected to use ordinary care, he could not recover although defendant was negligent, unless it appeared that the latter saw him approaching a place of danger and had reason to believe that he was unaware of it, and with ordinary care could have prevented the injury, was also held erroneous, as outside the issues.

In Akridge *v.* Atlanta & W. P. R. R. Co., 16 S. E. Rep. 81, there being no direct evidence of plaintiff's want of skill or that the horse was vicious and no circumstances from which the facts were fairly inferable, the court held that it was error to charge the jury if they believe from the evidence "the sole and the real cause of plaintiff's injury was the wild, vicious, and the refractory disposition of the horse he drove and the plaintiff's inability to control him, or the plaintiff's want of care or skill in the management of him, the plaintiff can not recover."

See also

Phila. etc. R. R. Co. *v.* Rice, 26 A. & E. R. R. Cas. 264..

Here a passenger was ejected from the train, the court in its opinion said: "But in addition to the damages

for the unlawful interference with the person of the plaintiff and the indignity to his character the court also instructed the jury that, if he was maliciously or wantonly ejected from the train, he was entitled to recover exemplary damages as a punishment to the appellant. But there is no evidence from which the jury could reasonably find that the plaintiff was maliciously or wantonly put off the train, the court erred in granting plaintiff's third prayer by which the question of punitive damages was submitted to the findings of the jury."

In Stoher *v.* St. L. I. M. & S. R. R. Co., 4 S. W. Rep. 393, an instruction was given on the question of damages, including the phrase, "and also having reference to any mitigating or aggravating circumstances you may find in the case." The court reversed a judgment for plaintiff and said: "There is in this case neither *allegation* nor proof of any malice, wickedness, wantonness or gross negligence as to the tort complained of, and there is a total absence of evidence as to any 'aggravating circumstances.' The case is not one authorizing vindictive or exemplary damages, and where, as in this case, there was no evidence of willful misconduct, or entire want of care indicating indifference to consequences, the jury, in determining the compensation in damages, cannot properly consider aggravating circumstances which do not exist."

The sixth instruction submits to the jury the question whether there were a sufficient number of brakemen to control the speed of the cars while in motion. (See page 76 of printed transcript.) This portion of the charge is clearly erroneous in that it requires a *sufficient number*, not reasonable care to provide a suffi-

cient number, as well as for the further reason that it is wholly unsupported by the evidence.

It is true the brakeman testified that if his fellow brakeman had been with him "he would have been of advantage to him," and "there was not enough men to hold her down easy." (See page 46 of printed record.) But it is apparent from the whole testimony of the witness that he made a miscalculation as to the grade, and let the cars get the start of him, and at this point and after they had the start of him, the other brakeman would have been of advantage to him, and at that time and after the cars had "got the start of him" there were not men enough to hold her down easy. (See pages 45, 46 and 47 of printed record.)

This is every word of testimony in the record on which to base a finding that defendant had failed to provide a sufficient number of brakemen, while the uncontradicted testimony of every witness who testified on the subject, shows that the train was manned by the same number of men with which such a train is usually manned, and that these men were competent. (See pages 49, 61 and 57 of printed record.)

Under this evidence and the authorities heretofore cited plaintiff in error insists that this portion of the charge was without evidence on which to base it, and calculated to mislead the jury, and should not have been given.

II.

The plaintiff, a laborer on a gravel train, whose duty it was to load gravel on the cars, and then ride to the place where the same was to be unloaded, and there un-

load it, is, while so riding, both upon principle and authority, a fellow-servant of the men operating the train, and cannot recover for injuries resulting from their negligence, even if that were proven.

The court below refused the instruction asked by defendant announcing this principle (see page 78 of printed transcript), and this ruling alone is sufficient to reverse and dismiss this case. Plaintiff in error begs leave to call attention to the authorities on this question somewhat at length.

Baltimore & Ohio R. R. Co. *v.* Baugh, 13 Sup. Ct. Rep. 914; U. S. Sup. C., decided May 1, 1893.

Opinion by Brewer, J.: A fireman injured by the negligence of the engineer in charge of the engine and under whose orders he was acting, held to be his fellow-servant, and company not liable.

In discussing the doctrine of fellow-servant the court said on page 921: "Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But it may be asked, is not the duty of seeing that competent and fit persons are in the charge of any particular work, as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its

discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery , and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution."

Quebec Steamship Co. *v.* Merchant, 133 U. S. 375. Opinion by Blatchford, J.

The stewardess of a steam vessel sued for damages for injuries received by her through the negligence of either the ship's porter or carpenter. In the opinion, the court said :

"As the porter was confessedly in the same department with the stewardess, his negligence was that of a fellow-servant. The contention of the plaintiff is that as the carpenter was in the deck department and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow-servant with the stewardess * *. The carpenter had no authority over the plaintiff, nor had the porter. They and the plaintiff had all signed the shipping articles, and the division into departments was one evidently for the convenience of administration on the vessel and did not have the effect of causing the porter and the carpenter not to be fellow-servants with the stewardess, and the court below ought to have directed a verdict for defendant."

N. Y. & N. E. R. R. *v.* Hyde, 56 Fed. Rep. 188, C. Ct. of Appeals, 1st Circuit (Mass), decided June 14, 1893. (Colt and Putnam, Cir. JJ., and Nelson, Dist. J.)

A yard clerk or car clerk in a railroad freight station whose duty required him to go into the yard for the purpose of getting a record of the seals of cars, which each train left or was to take away, was injured by the backing down upon him of part of a freight in control of the engineer and train hands. It was held that the injury was caused by fellow-servants and the company was not liable.

The court quoted the following paragraph from Randall *v.* R. R. Co., 109 U. S. 478, with approval:

"They are employed and paid by the same master. The duties of the two bring them to work at the same time and at the same place, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object, the moving of the trains. Neither works under the orders or control of the other."

Van Wickle *v.* Manhattan Ry. Co., 32 Fed. Rep. 278, U. S. Cir. Ct. S. D. of N. Y., decided January 14, 1886.

A track repairer and an engineer of an elevated railway company are fellow-servants, and for a personal injury resulting to the former, while in the course of his employment, solely from the negligence of the latter in running his train at too high a rate of speed, the company is not liable; such negligence of the engineer

being one of the natural and ordinary risks incident to the track repairer's employment.

Evansville & Richmond Ry. Co. *v.* Henderson, 33 N. E. Rep. 1021, Indiana Sup. Court, decided April 4, 1893.

Defendant in error, a laborer on a construction train, was injured by the derailment of the car on which he was riding. The accident was attributable to a great extent to the *reckless running* of the train by the engineer. Held that he could not recover as they were fellow-servants.

L. S. & M. S. Ry. Co. *v.* Stupak, 23 N. E. Rep. 246, Indiana Sup. Court, decided January 7, 1890.

Defendant in error, a laborer on a construction train engaged in ballasting and repairing the track, was injured by falling from the car on which he was riding. The fall was caused by a sudden and hard jerk of the engine. Negligence alleged was that engineer was a careless and incompetent man, and defendant railway company was aware of this fact. It was held by the court that the two were fellow-servants, and that the railway company was not liable.

Knahlta *v.* O. S. L. & U. N. Ry. Co., 27 Pac. Rep. 91, Oregon Supreme Court, decided June 24, 1891.

Plaintiff was a common laborer and was on a repair train, clearing the track after a series of land slides. The negligence alleged consisted in, *first*, an unsafe bridge and, *second*, the lack of care on part of the con-

ductor and engineer of the train in not discovering the condition of the bridge; plaintiff was injured by the fall of a train through this bridge. The court held that the plaintiff engineer and conductor were all fellow-servants as they were engaged in the same common employment under charge of superior officers, and so far as the accident was the result of any lack of care on part of the engineer and conductor, the railway company would not be liable. Judgment for plaintiff reversed.

Corona *v.* G. H. & S. A. Ry. Co., 17 S. W. Rep. 384, Texas Supreme Court, decided October 20, 1891.

The plaintiff, deceased, was employed as a common laborer on a gravel train, and was killed in a collision, the direct result of the negligence of the conductor of the train not protecting it. Held that the railway company was not liable as the conductor and deceased were fellow-servants, citing —

Ry. Co. *v.* Arispe, 17 S. W. Rep. 49.

In the latter case the deceased was a laborer on a gravel or work train and was killed in a collision caused by negligence of conductor and engineer in not obeying orders. The court held that there could be no recovery as they were fellow-servants with deceased.

Parker *v.* H. & St. J. R. R. Co., 19 S. W. Rep. 1119, Missouri Sup. Ct., decided March 28, 1892.

The plaintiff's husband, a railroad section hand, was killed by the alleged negligence of the engineer and

trainmen of the work train hauling stone for deceased and others to ballast track with. Held that deceased and the trainmen were fellow-servants and that railway company was not liable.

Prather *v.* R. & D. R. R., 9 S. E. Rep. 530, Georgia Supreme Court, decided July 11, 1888.

Deceased was one of a construction crew and while riding on a flat car was killed by a collision with a cow causing derailment. An instruction of the court below, that he was a co-employe with the balance of the "gang" and the trainmen, was held not error.

Howland *v.* M. L. S. & W. Ry. Co., 11 N. W. Rep. 529, Wisconsin Supreme Court, decided February 7, 1882.

The plaintiff, a shoveler of snow on a train engaged in clearing the track, was held to be a fellow-servant with the conductor in charge of the train and the others employed in the same business.

St. L., I. M. & S. *v.* Shackleford, 42 Ark. 417, Arkansas Sup. Ct., November, 1883.

The defendant in error was employed as a laborer upon a construction train. He was handling with others heavy iron when, without any warning, the cars moved, causing the iron to fall and crush his hand. Smith, J., in the opinion says: "Now it is unimportant whether it was the negligence of the conductor, or the engineer, or

of his immediate co-laborers, that produced the injury. They were one and all fellow-servants within the meaning of the rule which exempts the master from responsibility for such accidents * * the difference in the grade of servants being of no consequence, so long as they both serve and are paid by the same master, work under the same control and are engaged in the same general business."

Elliott *v.* C., M. & St. P. Ry. Co., 41 N. W. Rep. 758, Dakota Sup. Ct., decided February 9, 1889, affirmed on rehearing.

A section foreman and a train conductor are fellow-servants, and the railway company is not liable for the death of the former, caused by the alleged negligence of the latter.

Fagundes *v.* Cent. Pac. R. R. Co., 21 Pac. 237, California Sup. Ct., decided April 30, 1889.

A laborer employed by a railroad company to remove snow and other obstructions, is a fellow-servant with the trackwalker, whose duty it is to see that the track is kept clear, and with the conductor of a train. The company held not liable for injuries resulting from the alleged negligence of the latter.

Cassidy *v.* Me. Cent. R. R. Co., 17 A. & E. R. R. Cas. 519 (76 Me. 478), Maine Supreme Ct.

The conductor of a construction train ordered the deceased, a laborer on the same train, to get on the moving train from a platform; he attempted to do so; the stake which he grabbed was insufficiently or im-

properly fastened and he fell, suffering injuries that caused his death. It was held that the laborer, the conductor and the man who improperly fastened the stake were all fellow-servants, and plaintiff could not recover for death of deceased, the laborer.

Abend *v.* T. H. & I., 111 Ill. 202 (17 A. & E. R. R. Cas. 614), Sup. Ct. of Illinois, decided September 27, 1884.

A foreman of a wrecking crew, while on his way to work, took a seat with the engineer, contrary to rule, he was killed in a collision caused by the negligence of the engineer. Held that he was guilty of such contributory negligence as to bar a recovery, and also that he was a co-employe of engineer, and that defendant was not liable.

Railroad Co. *v.* Tindell, 13 Ind. 366, Sup. Ct. of Ind.

The deceased, a laborer, was employed on a gravel train, and rode back and forth, between gravel pit and the place where it was unloaded, on this train; through the negligence of the engineer it collided with an ox, and the laborer killed; held that representatives could not recover, as deceased and engineer were co-employes.

Gillshannon *v.* R. R. Co., 10 Cush. 228, Sup. Ct. of Mass.

The plaintiff in this case was an ordinary laborer, and rode with the company's consent on a gravel train to and from work. On the way to work, this train, through the negligence of engineer and those having charge of train, collided with a hand car, and plaintiff

was injured. Held that he could not recover, as they were fellow-servants.

Evansville &c. R. R. R. Co. *v.* Henderson, 33 N. E. Rep. 1021, Sup. Ct. of Ind., decided April 4, 1893.

The defendant in error was employed on a construction train and at the time of the accident, distributing ties; while on the car loaded with ties, the engineer negligently ran the train at such a speed as to derail the car, injuring Henderson; held that he could not recover, as the engineer and himself were fellow-servants.

Railroad Co. *v.* Keefe, 47 Ill. 108, Supreme Court of Ill.

Keefe was at work on a construction train unloading railroad iron. While so engaged, the conductor signaled the engineer to run his train on a siding to get out of the way of an approaching passenger train. The engineer without giving the signal required by the rules, started his engine, and Keefe was thrown from the flat car and injured. The injury was held to be the result of the negligence of a co-employe.

Railway Co. *v.* Britz, 72 Ill. 256, Supreme Court of Ill.

Britz was employed as a laborer on a construction or repair train hauling gravel. It was necessary that he should ride on the train between the places of loading and unloading. While thus on the train, through the negligence of the engineer or brakeman, it collided with a passenger train and plaintiff was injured; held that he could not recover, as they were fellow-servants.

Int. and G. N. R. R. Co. *v.* Ryan, 18 S. W. Rep. 219, Supreme Court of Texas, decided December 15, 1891.

A railroad employe working in a bridge gang, is a fellow-servant with workmen in the transportation department, although they have no duties in common, and are under the direction of independent superintendents.

Tarrish *v.* P. & A. R. R. Co., 9 Sou. Rep. 696, Sup. Ct. of Florida, decided July 11, 1891.

The court held here that the engineer, fireman, brakemen and shovelers, on a train, engaged in loading, hauling and unloading gravel in repair of the road-bed, are fellow-servants engaged in the same common work, and the employer company is not liable to one of such shovelers for personal injury received in consequence of the negligence of the engineer in putting the handling of his train in the hands of a fireman, who was either careless or unskilled in the management of such machines.

The direct cause of the accident being the backing down of the engine with such force against the cars on which plaintiff was working as to drive them some twenty-five or thirty feet and throw plaintiff down, and under the wheels.

Higgins *v.* Mo. P. Ry. Co., 104 Mo. 413, Sup. Ct. of Mo., decided April term, 1891.

In this case the court held that an engineer and a laborer on a construction train are fellow-servants, where they work under the same conductor, and are

engaged in the same general business though in different grade of employment. The deceased was standing upon a flat car, when the engineer without notice, started so suddenly as to throw him off the car, wheel passing over and killing him.

Simons *v.* L. & N. R. R. Co., 18 S. W. Rep. 1024, Ct. of App. of Ky., decided March 19, 1892.

The appellee was using its construction train in hauling rock to a place on its railroad near Nolin's station. The train had dumped one load of rock at the same place that morning, and when the train reached the same place with another load of rock to be put off it was stopped with a jerk. William Simmons, who was a hand employed on the train, and was sitting on the side of one of the flat cars with his legs hanging outside of the car, was thrown under the car by the sudden jerk, one of the wheels of the car stopped on his coat and held him under the car, but not seriously hurting him; after which the train moved north, which caused one of the wheels to run over Simmons, killing him.

The court held that the failure to blow the whistle by the engineer as a signal for stopping was not negligence, as the deceased knew that the train would stop about that place.

Kemler, Admr., *v.* the Junction R. R. Co., 33 Ohio St. 150, 1877, Sup. Ct. of Ohio.

A railroad company engaged in ballasting its track employed a hand to assist in loading and unloading the gravel on the train. While riding with his shovel on

the loaded train, it starts suddenly, throwing him off and under the train killing him ; the court held that he did not assume the character of a passenger on the train, and a charge that there was between defendant and deceased an implied contract to carry safely was error ; further held that those in charge of the train, *i. e.*, engineer and conductor were fellow-servants of such hand.

Ryan *v.* Cumb. Val. R. R. Co., 23 Pa. St. 384, 1854, Sup. Ct. of Penn.

Plaintiff was a laborer on a gravel train and while going to work in the morning was injured by the alleged negligent dumping of some of the gravel cars; the court held that he was not a passenger, and was a fellow-servant with conductor.

Mele *v.* D. & H. C. Co., 14 N. Y. Sup. 630, 1891, Super. Ct. N. Y.

Plaintiff was a track laborer, and while on his way to work was injured by a passing train striking him. Held he was a fellow-servant with engineer.

Heine *v.* C. & N. W. Ry. Co., 58 Wis. 525, Sup. Ct. of Wis. 1883.

The plaintiff was engaged with others surfacing track for defendant and it was his duty among others to shovel gravel from loaded trains; while he was getting upon such a train after it was loaded for the purpose of being carried to place where the gravel was to be distributed, the conductor negligently and carelessly started the

train and the plaintiff was injured. Held they were fellow-servants, and he could not recover.

Russell *v.* Hudson River R. R. Co., 17 N. Y. 134, 1858, Ct. of App. of N. Y.

Plaintiff was a laborer on one of defendant's gravel trains, and while going home at night after the day's work he was injured by derailment of train through negligence of engineer; it was held that he was not a passenger, and was a fellow-servant of engineer, and could not therefore recover.

T. W. & W. Ry. Co. *v.* Durkin, 76 Ill. 395, 1875, Sup. Ct. Ill.

Deceased was killed, while returning from his work on a gravel train, in a collision with a cow, occurring through negligence of engineer. He was employed as a laborer on a gravel train engaged in ballasting track; the court held that he was a fellow-servant with the others and could not recover.

Seaver *v.* B. & M. R. R. Co., 14 Gray, 466, Sup. Ct. of Mass., 1860.

Held that a carpenter, riding on a train to place of work, employed by company, was fellow-servant with those in charge of train.

Tunney *v.* Mid. R. R. Co., 1 C. P. L. R. 291.

The plaintiff was employed on a "pick-up" train as a common laborer, while returning from work he was injured by negligence of guard. Held that he was not passenger and was a fellow-servant with the guard.

Berrigan *v.* N. Y. L. E. & W. R. R. Co., 30 N. E. Rep. 57.

The court say here: "The injury which plaintiff's intestate received must be regarded under settled rules as one of the incidents of an employment of a hazardous nature. A co-employe who had charge of an engine backed it up against the loaded cars, standing upon the siding, with such force as to drive them back upon the caboose, and by this means the arm of the deceased was crushed. The engineer may not have used proper care in moving his engine, but injury from such a cause is one of the risks which the brakeman took when he entered the defendant's service."

III.

The evidence in this case shows that when plaintiff fell, he was sitting on the edge of a flat car with his feet hanging down loose—with nothing to hold on to.

It is further shown by the uncontradicted evidence that there was a caboose attached to the train for the purpose of transporting the hands, capable of holding forty men, and that but about eighteen or twenty men were on board.

It further appears beyond dispute that had he been in the caboose, he would not have been injured—as he was the only man who was in such a dangerous position, and the only man who was injured. (See page 17 of printed record.)

The plaintiff himself testified, that he knew that they were about to do some coupling (see pages 18

and 19 of printed record), and also testified that he was not watching (see pages 18, 19 and 20), and did not see the cars come down, though the cars between him and the moving cars were all flat cars and there was nothing to obstruct his vision.

There was evidence tending to show that the men had been repeatedly warned that it was dangerous to ride outside on the flat cars, and had been directed to ride in the caboose, and that this warning and direction had been given in plaintiff's presence at least once on that day, though plaintiff denies hearing it. (See pages 37, 38, 48, 54 and 66 of printed record.)

There was also evidence tending to show that before the cars struck the train on which plaintiff sat, at least two men gave warning sufficiently loud to have been heard by him, had he been paying any attention to the moving train, by hallooing "Look out." (See pages 34, 45, 50, 56 and 67 of printed record.)

Under this evidence plaintiff in error insists that the plaintiff was guilty of such contributory negligence as to bar a recovery, in not keeping his eyes and ears open, situated as he was, and knowing that other cars were to be coupled to those on which he was carelessly sitting, and in having needlessly placed himself in a situation of danger, the peril of which was obvious, when a place of safety had been provided for him, and to this effect are all the cases; thus:

In the Balt. & P. R. R. Co. *v.* Jones, 95 U. S. 439, the defendant in error was riding on the pilot of the engine, and when passing through a tunnel was injured by colliding with some box cars. The collision occurred through the negligence of the defendant. Mr.

Justice Swayne, in the opinion says: "The plaintiff had been warned against riding on the pilot and forbidden to do so. It was next to the cowcatcher and obviously a place of peril, especially in case of collision. There was room for him in the box car. He should have taken his place there. He could have gone in the box car in as little, if not less time than it took to climb on the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound in a high degree of care, did not insure his safety. He was not an infant nor *non compus*. The liability of the company was conditioned upon the exercise of reasonable care and caution on his part. Without the latter the former could not arise. He and another, who rode beside him, were the only persons hurt on the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration, as anything short of mathematics will permit."

(See also Griggs *v.* Co., 104 U. S. 553.)

St. L. & S. F. Ry. Co. *v.* Marker, 41 Ark. 542.

The plaintiff here was a laborer employed on a con-

struction train. While being conveyed to his place of work on a flat car his foot was injured by striking a cattle guard. He was riding on a flat car with his feet dangling over, contrary to orders. The court held that he was guilty of such contributory negligence that he could not recover.

Glover *v.* Scotten, 46 N. W. Rep. 936. The deceased here was a switchman and was killed while upon the pilot by colliding with a team. The court in its opinion says: "There was a safer place for him to ride. He was neither required nor directed to ride in a place which every person of ordinary intelligence and observation knows was the most dangerous he could have chosen. The fact that upon switch engines switchmen rode standing on the platform, provided for them in front of the engine, had no tendency to prove that deceased was justified in riding in a sitting posture upon the cowcatcher of a road engine. Nor would the fact that switchmen were in the habit of riding excuse the deceased as between him and the defendant. Yet the judge substantially left the jury to determine the question of contributory negligence by the determination of the question as to whether the deceased was riding in the usual and ordinary place upon the engine. If switchmen always rode there, still that fact would not take them within the rule of contributory negligence. *When a safer place is provided and employes choose a more dangerous one they do so at their own risk.* The difference in danger in standing on a regular platform of a switch engine and setting on a cowcatcher with one's legs hanging over it, is apparent. In the one case the switchman is ready to jump at the

approach of danger; in the other considerable time must elapse before he could recover his standing position upon the pilot beam and put himself in readiness to avoid danger. In the present case deceased was the only one upon the engine who was injured. There was no fact in this case for the determination of the jury. The question was therefore one purely of law."

Kresanowski *v.* N. P. R. R. Co., 18 Fed. Rep. 229.

The plaintiff was employed by the defendant railway company in excavating, and was sent with others to the place of work on an engine provided by the company for that purpose. The tender being full of wood, he, with others, sat on the front of the engine with his feet over the pilot. While proceeding to his work in that position, the engine on which he was riding ran into another engine, and the plaintiff received the injuries for which he seeks damages. On motion of the court to instruct the jury to find a verdict for the defendant upon the ground, with others, that the evidence showed contributory negligence which would bar a recovery, the court following the law laid down by the Supreme Court in R. R. Co. *v.* Jones, 95 U. S. 439, held that the plaintiff himself so far contributed to his injury by his own negligence and want of ordinary care and caution in placing himself in such a dangerous position on the engine of defendant, that he could not recover.

In Martin *v.* B. & O. R. R. Co., 41 Fed. Rep. 125, a brakeman riding upon a brake wheel and who was injured by the negligence of the train crew was, by reason of his dangerous position, deemed guilty of such contributory negligence as to bar a recovery.

Martenson *v.* C., R. I. & P. R. R. Co., 11 A. & E. R. R. Cas. 233.

The plaintiff here was a brakeman and was injured while upon one of the oil boxes of the car hanging to the slats above, by striking a platform. The court held that he needlessly put himself in a dangerous position and could not recover and refused to hear or pass upon any other point.

Lehigh Valley R. R. Co. *v.* Greiner, 28 A. & E. R. R. Cas. 397.

Greiner who was employed by the railroad company at its shops, with others made an arrangement with an engineer of the company to carry them each evening to their homes about two miles from the shops. The train consisted of a locomotive, a tender and a gondola car. The gondola truck stood eleven inches higher than that of the tender; Greiner had a habit of sitting on the rear platform of the tender with his legs hanging over the side. He was repeatedly warned of the danger he was placing himself in. While so riding and while there was plenty of room in the gondola the train stopped at a point to discharge some articles, when a light engine that had been following the gondola, through a blunder of the engineer in charge, ran against the rear bumper of the gondola and forced the forward bumper of it upon to the rear platform of the tender where Greiner was seated. The result was that he was killed.

It was held that no damages could be recovered for his death.

In Warden *v.* L. & N. R. R. Co., 53 A. & E. R. R. Cas. 470.

The plaintiff, a brakeman, was injured while riding on the pilot of an engine and the court held him guilty of negligence *per se.* The opinion reviews several cases, and is well worthy of examination.

By the eighth paragraph of the court's charge (see page 76 of printed transcript), the jury are instructed that, upon the issue of contributory negligence, the burden of proof was upon the defendant, and unless "*the defendant* has established contributory negligence by a preponderance by the evidence," the jury were instructed to find for the plaintiff on that issue.

Now conceding that the burden to establish contributory negligence was upon the defendant, this portion of the charge is erroneous and misleading, in that it requires the evidence to establish it, *to come from the defendant*, while the true rule is, that if from *all the evidence* it appears that plaintiff has been guilty of contributory negligence he cannot recover—in other words, by a fair construction of this portion of the charge, the plaintiff and all his witnesses might have testified to gross and culpable negligence on the part of the plaintiff, which contributed directly to his injury, yet, unless defendant established such negligence from its own testimony the jury must find for the plaintiff on that issue. This we submit is not the law.

By the last clause of the seventh paragraph of the court's charge (see page 76 of printed record) the jury are instructed that the measure of care required of plaintiff was such care and prudence as "was reasonable to expect from a person of ordinary care and prudence

in the situation *in which he found himself placed.*" Now, one the acts of contributory negligence on which defendant relied, was the very fact that plaintiff had voluntarily placed himself in a dangerous situation, and by this clause of the charge, that element of contributory negligence is entirely withdrawn from the consideration of the jury.

The record in the case bristles with error, and the judgment should be reversed, and as it is apparent that plaintiff cannot recover, the court below should be directed to dismiss it.

GEO. R. PECK ~~and~~
EDWARD D. KENNA ~~with~~
A. J. BRITTON ~~& GRAY~~,
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
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CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Plaintiff in Error,

vs.

GERHARD SCHUMACHER.

No. 239.

Brief for Defendant in Error.

On the 27th day of September, 1887, Gerhard Schumacher filed his complaint in the District Court of the United States for the Western District of Arkansas, claiming damages for a personal injury to him, caused by the negligence of the defendant, the railway company. The plaintiff alleges that he was employed as a laborer on a gravel train on defendant's railway in the Choctaw Nation in such district, and that at Talihina in switching cars from the side track to put in this train, they were allowed to run down a steep grade till they struck the train on the main track, upon which train the plaintiff was sitting, and by reason of a defective brake on said cars the brakeman was unable to check their speed, and thus they struck his train with great force and threw him off and run over him, crushing his left leg, making amputation thereof necessary (Rec., 1 and 2).

Defendant below filed a demurrer to this complaint on

the ground, that the court had no jurisdiction of the subject of the action or of the person of plaintiff or defendant. The court overruled the demurrer. No exception was taken or saved (Rec., 3).

On the 28th day of May, 1889, the plaintiff filed a second count to this complaint by way of amendment, which is called an amended or supplemental complaint (Rec., 2).

In this count he alleged that he was a subject of the Empire of Germany, and, at the time of the injury complained of, residing in the Choctaw Nation in such district as an employé of defendant, as a laborer on a gravel train, and was in discharge of his duty on the train at Talihina, where defendant so negligently and improperly managed and conducted the train and the cars of defendant, that the plaintiff was knocked off the train and run over by the cars of the defendant and greatly injured (Rec., 3).

This was filed in the *Circuit Court*, the case having been transferred to that court by order in pursuance of the act of Congress of February 6, 1889, creating a Circuit Court at Fort Smith.

A *nunc pro tunc* order after the trial, July 25, 1889, says that defendant files demurrer to complaint and supplemental complaint, which was overruled as for May 28, 1889, the day the trial began.

Defendant filed his answer to complaint and supplemental complaint May 28, 1889, in the Circuit Court (Rec., 4, &c.).

On the 28th day of May, 1889, the trial began, and on June 3, 1889, the jury rendered a verdict for the plaintiff (Rec., 9).

A motion for new trial was overruled, a bill of exceptions allowed, and writ of error taken, but the transcript not having been filed in the time allowed by law, a new citation was served and transcript finally filed October 13, 1890.

No assignment of errors was ever filed.

It will be seen by the court that this Record is a very meager one, and a very imperfect one as well; but if the plaintiff in error can afford to rest upon it, certainly the defendant in error can. But we are not favored by plaintiff in error with any assignment of errors to comply with either the provisions of rule 20 and rule 35 of this court, and the case should be dismissed, for it is very certain that there is no *plain error* assigned or not assigned. However, if the court thinks it is its duty to grope in the dark and hunt for errors, we will do the best we can in attempting to argue, without knowing exactly what there is to argue.

Was it error to overrule the demurrer to the complaint filed January 23, 1888?

There is no special appearance here in any way expressed.

The demurrer itself, without a special limitation of its effect, is a general appearance in the action.

The demurrer does not reach to the question of service of process—that does not appear on the face of the complaint.

Where a demurrer is for want of jurisdiction of the person, a defect in the service of summons can not be taken advantage of.

Maxwell Code, Pl., 360.

Nor would the demurrer raise the question of the proper district in which the defendant should be sued; that was waived by a general appearance; it was a personal privilege of the defendant corporation to be sued in the district of the State of its creation, citizenship and residence, but that could be waived—it was not a question of jurisdiction.

Gracie *v.* Palmer, 8 Wheat., 699;

Toland *v.* Sprague, 12 *Ib.*, 300, 330;

Ex parte Schollenberger, 96 U. S., 369, 378;
Bank *v.* Morgan, 132 U. S., 141, 145;
Railway Company *v.* McBride, 141 U. S., 127, 130;
Railway Company *v.* Cox, 145 U. S., 593, 603;
Jones *v.* Andrews, 10 Wall., 327.

In the cases of Southern Pacific Co. *v.* Denton, 13 Sup. Ct. Reporter, 44, and Harkness *v.* Hyde, 98 U. S., 476, 479, and Shaw *v.* Mining Co., 145 U. S., 444, there was a special appearance to plead to the jurisdiction.

In this case there is no special appearance, as there was in *Harkness* v. *Hyde, 98 U. S., 476.* The waiver is complete. Therefore, there was no error in overruling the demurrer. The complaint showed a case of Federal jurisdiction, the plaintiff as subject of the Empire of Germany, and the defendant a citizen of the State of Missouri.

Gracie *v.* Palmer, 8 Wheat., 699.

As to the jurisdiction of the *Circuit Court*, no question was ever raised below on that point. When the case was brought in the district court, the law was in force, giving it Circuit Court powers, and the case was in that court by virtue of its Circuit Court powers. The act of Congress creating the Circuit Court for said district provided that cases of that kind should be transferred to the Circuit Court by order of the *Circuit Court.*

Acts of 1888–9, p. 655 (ch. 113).

That order was duly made May 6, 1889, as appears (Rec., 1), but is not in the transcript filed by the appellant. But the case appears on the Circuit Court docket, where it should be without any objections from either of the parties.

On May 28, 1889, plaintiff filed his amended or supplemental complaint in the *Circuit Court*, and the order filing *nunc pro tunc;* the demurrer specifies that it is

filed to complaint and supplemental complaint. That demurrer does not appear in the transcript, nor does the order say what it demurs to (Rec., 10), or state its language.

The statutes of Arkansas provide as follows:

"The demurrer shall distinctly specify the grounds of objection to the complaint; unless it does so, it shall be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action."

Mansfield's Digest, sec. 5029.

This would be a plea to the merits and itself an appearance in the action in the Circuit Court.

Ry. Co. *v.* McBride, 141 U. S., 127.

And pleading over after demurrer to declaration overruled, is a waiver of the demurrer.

Stanton *v.* Embry, 93 U. S., 548, and cases cited.

The transcript shows enough to clearly indicate that there was no special appearance to file the demurrer, and consequently if we should presume that it was to the jurisdiction of the court, there was still a waiver of the personal privilege as to district of suit, and it being clear that the case is one of Federal cognizance in a Circuit Court, the demurrer was properly overruled. (Patterson *v.* U. S., 2 Wheat., 221.) The authorities cited as to the demurrer in the district court apply here. On the 28th of May, 1889, an answer was filed in the Circuit Court, and the case was tried.

The above considerations show that the court had jurisdiction on general principles as to the amount, and the character of the parties. But there is another ground of jurisdiction.

The act of Congress granting a right of way to the St. Louis and San Francisco Railway Company, the defend-

ant, provides in section 3 for damages "for all cases of injury to persons or property occasioned by the construction or operation of said road and telegraph line after the construction thereof shall have been commenced," and continues: "In addition to the foregoing, the injured parties shall have the right of recourse to all legal remedies that may be applicable in like cases in the judicial tribunals; and *consent* is hereby given that the civil jurisdiction of the District Court of the United States for the Western District of Arkansas, *and such other courts* as may be established by authority of the United States, shall be extended within the territory and limits of the Choctaw and Chickasaw Nations, *without distinction as to the citizenship of the parties*, so far as may be necessary for the enforcement of the provisions of this act."

Act of 1881–2, p. 182.

This act was approved August 2, 1882. Since that time, that is, on the 6th day of February, 1889, the Circuit Court here has been established "by authority of the United States," and has general jurisdiction over all the territory in the Choctaw Nation, where the defendant's road is located and where the injury occurred. It it confidently submitted that this act by which defendant solemnly *consents* to the jurisdiction of these courts is conclusive of this question.

As to the sufficiency of the testimony to sustain the verdict, no motion to instruct peremptorily for the defendant was made in the court below, and therefore it is conceded that the evidence is sufficient; and on the face of the record the evidence is not only sufficient, but convincing.

The correctness of the instructions can hardly be examined into here, since no sufficient exception was taken and saved to each one of the instructions given for plaintiff and offered for defendant but refused. The plaintiff

offered ten instructions in a mass. The court refused the first two and gave the other eight. Then follows the objection thus:

"To the giving of each and every of said several instructions the defendant at the time *objected*. The objection was overruled as *to all* of said several instructions excepting as to instructions numbered 1 and 2, which the court refused to give, but charged and instructed the jury pursuant to request of plaintiff as contained in his instructions numbered 3, 4, 5, 6, 7, 8, 9, and 10, over the objection of defendant, and to which the defendant excepted and still excepts." (Rec., 76.)

The objection and exception should have followed each instruction. As they stand, they go only to the mass, and if they contain one sound proposition, the exception must be overruled.

The defendant then asked nine instructions in a mass. The court refused to give them except No. 7, and the Record (p. 78) proceeds:

"To the refusal to give which *said instructions* the defendant at the time objected; the objections were overruled, and the defendant excepted and still excepts."

The court modified the first six instructions and gave them as modified in a mass:

"To the giving of *said several instructions* in said modified manner the defendant at the time objected. The objection was overruled by the court, and the defendant at the time excepted and still excepts." (Rec., p. 79.)

An objection "to all and each part of said instructions" is too general to be considered.

Black *v.* Darling, 140 U. S., 234, and cases cited.

Not only this, but the rules of this court and various decisions by it require the exceptions to be specific as to the matter complained of, and that this matter should be stated with special directness, and not in a mere sweep-

ing allegation, leaving the court to find the point as best it can.

Rules 4 and 21, and
Hanna *v.* Mass., 122 U. S., 24;
N. Y., &c., *v.* Fraser, 130 *Ib.*, 611;
Patrick *v.* Graham, 132 *Ib.*, 627.

The prayers were asked in the aggregate, and all were bad if any one was bad.

Indianapolis, etc., Co. *v.* Horst, 93 U. S., 291, 295.

As applicable to these exceptions see—

Rogers *v.* The Marshal, 1 Wall., 644, 647, 654;
Johnston *v.* Jones, 1 Black, 220;
Moulton *v.* American Life Ins. Co., 111 U. S., 336, 337;
Elliott App. Proc., sec. 791.

If, however, the exceptions are deemed sufficiently specific, then it would seem that there is nothing in the instructions given for plaintiff of which the defendant has any right to complain.

The court modified the instructions on both sides, so as to present to the jury the only question in the case, namely:

Was the negligence of the defendant subsequent to the negligence of the plaintiff; and if so, did the defendant use reasonable care and prudence to avoid the consequences of the negligence of the plaintiff.

This is the doctrine of the case of Davies *v.* Mann, 10 M. & Wells. 546; but at the time of the trial of this case the various decisions of this court following that doctrine had not been made; but it was then, as now, the law, and has been since expressly applied in the following cases, which are strikingly similar to this case.

Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S., 551, and cases there cited;
Grand Trunk Ry. Co. *v.* Ives, 144 U. S., 408, and cases cited;

Washington & G. R. Co. *v.* Harmon, 147 U. S., 571.

See, also, 1 Shearman & Redfield Neg., sec. 99;

Also, the opinion of the court below in this case on overruling the motion for new trial, 39 Fed. Rep., 174 (Rec., 78, &c.).

The use of the words wilfully and intentionally are explained by the court in the last instruction given, and could not have misled the jury. The complaint alleged negligence. There was no claim of anything else but negligence; therefore, any expressions in the charge of the court as to a specific purpose of defendant were abstract, but not in any way practically misleading.

Walker *v.* Johnson, 96 U. S., 424.

If they were misleading it was a serious injury to the plaintiff and to the great advantage of the defendant, because it would make it much harder for the plaintiff to get a verdict; requiring him to go further than to show a simple omission, but to show actual malice. Of this the defendant can not complain.

The attention of the court was not directed to the phase of the case that would show that the instruction was broader than the complaint. An instruction should have been offered on that point by defendant.

Mutual Life Ins. Co. *v.* Snyder, 93 U. S., 393.

There are no degrees of negligence. Gross negligence is simply negligence. It is want of due care, according to circumstances.

N. Y. Cen. R. R. Co. *v.* Armes, 91 U. S., 494; 16 Am. & E. Enc. Law, 426.

A complaint in an action for negligence charged defendant with negligence, but used the qualifications "wanton," "wilful," and "with the intention to injure" plaintiff. It was, however, held that the gravamen of

the action was simply negligence, and that the complaint stated a good cause of action.

Cleveland, etc., R. Co. *v.* Asbury, 120 Ind., 289.

The allegation being negligence, proof of any degree of negligence, small or great, was admissible.

That the evidence was ample to show a case of negligence on the part of the defendant, is quite obvious. However the defendant's omission of due care may be denounced as wilful, gross, reckless or wanton, it will still remain that he was guilty of negligence.

A conductor of a gravel train, having entire control of the laborers on the train, and one of such laborers on the train employed to shovel gravel, are not fellow-servants:

Chicago, etc., Ry. Co. *v.* Bayfield, 37 Mich., 205, Cooley, C. J., delivering the opinion;

Chicago, St. P. M. & O. Ry. Co. *v.* Lundstrum, 20 N. W. Rep., 198;

Chicago, etc., Ry. Co. *v.* Swanson, 16 Neb. 254;

Chicago, M. & St. P. Ry. Co. *v.* Ross, 112 U. S., 377.

When, though matters have been submitted to the jury which ought not to have been so submitted, they have decided them correctly, such a verdict will be sustained.

Pence *v.* Langdon, 99 U. S., 578.

And when the law is given by the court, though in language different from that requested by a party to the suit, and the jury has the benefit of the law, there is no error.

Walker v. *Johnson, 92 U. S., sup;*
Patrick v. *Graham, 132 U. S. sup., Ib., 172;*
The Schools v. *Risley, 10 Wall., 91.*

Respectfully submitted.

A. H. GARLAND,
For Defendant.

FILED.
JAN. 30 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY CO.,
PLAINTIFF IN ERROR,
vs.
GERHARD SCHUMACHER.

No. 239.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

GEO. R. PECK,
A. T. BRITTON,
A. B. BROWNE,
E. D. KENNA,
Attorneys for Plaintiff in Error.

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No. 239.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

The jurisdiction of the U. S. Circuit Court wherein this cause was tried is not here challenged by plaintiff in error.

II.

Brief for plaintiff in error was seasonably filed and contains full assignments of error as presented by Rule 21.

III.

The exceptions of plaintiff in error to each instruction given by the Court for the plaintiff was sufficiently pre-

sented. The record recites (p. 76) "To the giving of *each* "*and every* of said several instructions the defendant at the time objected," and to the instructions as allowed by the Court "the defendant excepted and still excepts."

The entire statement as to these exceptions is given in a a single sentence of the bill of exceptions, and when read together it is plain therefore that plaintiff in error objected and excepted to each of such instructions as asked and given by the Court. Counsel claims that "the objection and ex- "ception should have followed each instruction," but when it so plainly appears that plaintiff in error did object and except severally to each and all of the instructions so given the statement in that form is the precise equivalent of a separate objection and exception following each instruction.

The same conclusion obtains with respect to the defendant's exception to the Court's refusal to give the instructions asked by it (Rec. 78), and to the modified instructions given by the Court (Rec. 79). It was in no sense a single or general exception to the whole charge of the Court, which is held insufficient by the authorities cited upon opposing counsel's brief. Each prayer for instructions asked, given, refused, or modified presented separate subject-matter; were in intention and effect separately objected to, and the errors therein here relied upon are plainly shown by the assignment of errors and argument submitted thereon in our original brief.

IV.

No negligence by defendant was shown as occurring *subsequent* to the negligence of plaintiff. The entire testimony appears in the bill of exceptions, and that pertinent to this question is fully noted in our original brief. Plaintiff's negligence was *continuous* down to the moment of the accident; was persisted in after repeated warnings, which were

again renewed as the cars were moving down to be coupled. Plaintiff deliberately chose a place of great danger; kept it after being warned and directed to ride in the caboose. He paid no attention to the final warning, shouted loudly when he sat within hearing and seeing distance of the moving cars, and with unobstructed opportunity to observe their coming, and when others around him saw the situation and heard the warning without difficulty.

Each of the modified instructions given by the Court negatived the effect of plaintiff's proven negligence and the Court's comment thereon by directing that if defendant's negligence "was wilful and intentional for the purpose of "injuring plaintiff, in such case you will find for plaintiff;" whereas neither the complaint nor the proof averred or presented *any* evidence even suggesting such "wilful and in-"tentional negligence" on the part of the defendant. The jury were thus over and over again *invited* to consider a proposition of fact as to which *no* evidence had been adduced. This was manifest error.

The plain effect of this repeated charge was to say to the jury, "The defendant's negligence (if found) must defeat "his right to recover *unless* you find the defendant guilty "of wilful and intentional negligence." There being no averment in the complaint tendering such an issue, and nothing in the evidence tending to support such a finding, it is manifest this error of the Court entirely relieved the jury from considering the question of plaintiff's proven negligence, if they should find (as thus erroneously authorized) wilful and intentional negligence on the part of defendant.

The contention that these erroneous expressions in the charge "as to a specific purpose of defendant were ab-"stract, but not in any way practically misleading," is incorrect. Nor does the authority cited— *Walker* v. *Johnson*

96 U. S. 424—support such contention. There the Court's expressions in its charge had relation to a *separate* action, which defendant might have for plaintiff's breach of contract, and this Court rightly observed that "they in no wise "prejudiced defendant in the *present* action." * * * That is not this case.

That the instructions as to "wilful and intentional" negligence by defendant was broader than the complaint is beyond question. The error of the Court in so instructing in the face of the complaint could not be cured by a separate instruction offered by defendant as counsel suggests. Nor does his citation support his suggestion by even remote application. When the Court thus went beyond the allegation of the complaint the error could not be corrected except by withdrawing its erroneous charge. This was not done, and the exception taken thereto was the only method open whereby review could be asked and the error corrected.

The contention that there are no degrees of negligence is not pertinent, and hence discussion thereof is waived. The *fact* is shown by this record that the trial Court by its charge *made* such degrees of negligence *in this case*, and impressed them upon the jury by repeated charging. It is manifest that if this portion of each modified instruction given by the Court had been omitted (as it should have been) the jury could not have found a verdict for plaintiff in the face of his proven gross and continuing negligence. Or if so found, the Court would have been compelled to set the verdict aside.

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